COMMISSION DECISIONS

Mines Corporation, Docket No. PENN 83-141-D (Judge Koutras, Decembe

Review was Denied in the following cases during the month of January

United Mine Workers of America, Local #1197 v. Bethlehem Mines Corpo
Docket No. PENN 83-234-D (Judge Broderick, December 13, 1983)

Secretary of Labor, MSHA v. United States Steel Corporation, Docket
PENN 83-221 (Judge Merlin, December 14, 1983)

United States Fuel Company v. Albert J. DiCaro, Docket No. WEST 82-1
(Judge Fauver, December 15, 1983)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

January 6, 1984

ECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. PENN 82-3-R
	:	PENN 82-15
v.	:	
ATHIES COAL COMPANY	:	

DECISION

This consolidated proceeding arises under the Federal Mine Safety nd Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1976 & Supp. V 1981), nd presents the question of whether a violation of 30 C.F.R. § 75.1403 as "significant and substantial" within the meaning of Cement Division, ational Gypsum Company., 3 FMSHRC 822 (April 1981). The Commission's dministrative law judge concluded that Mathies Coal Company ("Mathies") iolated the standard, that the violation was significant and substantial nd assessed a penalty. 4 FMSHRC 1111 (June 1982)(ALJ). We granted athies' petition for discretionary review, which challenges only the udge's significant and substantial findings. For the reasons that follo e affirm.

On September 22, 1981, during a spot inspection of Mathies' undergro oal mine, an inspector of the Department of Labor's Mine Safety and Heal dministration ("MSHA") issued a citation to Mathies under section 104(a) he Mine Act, 30 U.S.C. § 814(a)(Supp. V 1981). The citation alleged a v ion of 30 C.F.R. § 75.1403, 1/ and stated:

/ The portions of the standard involved in this citation are:

Section 75.1403, a statutory provision, which requires that

> [o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to

The citation also alleged that the violation was significant and substanti
The inspector issued the citation at the start of the day shift, immediate
following the mantrip operator's regular check of the mantrip. The inspec
or terminated the citation five minutes later after Mathies adjusted the
valve and refilled the defective sander with sand. Thereafter, Mathies fi
with this independent Commission a notice of contest of the citation. The
ontest proceeding subsequently was consolidated with the Secretary of Lab
proposal for a civil penalty.

The mantrip was used by Mathies to transport its production crews of
iners to and from working areas in the mine. The mantrip traveled along
haulage track from an area near the mine portal called the "bottom" to the
working sections, at the beginning of each of three shifts and back again
the conclusion of the shifts. In addition to primary and secondary brakin
systems, the mantrip was equipped with a sander above each of its four whe
Each sander contained a half-gallon of sand. The sanders supplemented the
mantrip's brakes by dispensing sand in order to increase the friction betw
the haulage track and the wheels. The mantrip used only the two sanders a
the front end, as determined by the direction of travel. One hand lever
activated the two sanders at the front end of the mantrip, so that one
inoperable sander would reduce sanding capacity by one-half.

The record evidence indicates that sanders were most likely to be nee
to supplement a mantrip's brakes in wet conditions, on curves, or on grade
The Mathies mine was considered to be a "wet" mine. Some areas along the
age track were always damp or wet. In a few locations, Mathies used sump
to reduce excess moisture. On September 22, 1981, the haulage track was w
least in part because it was a high humidity time of year. The mantrip's
to the working section on the September 22d day shift passed curves, inclu
blind curves and an S-curve, and hills, the steepest having a 3.4% grade.

At the time the inspector issued the citation, the mantrip was fully
loaded and ready to go. The inoperable sander was on the rear end of the
mantrip. Because the mantrip changed directions five minutes into the
20-minute trip, however, what was the rear end of the mantrip at the star
of the trip would become the front end. Thus, the majority of the mantri
6,500-foot trip into the mine and a portion of the return trip could have
required the use of the inoperable sander to supplement the brakes.

2/ A general notice of safeguard, issued December 1, 1972, requiring sa
devices on all self-propelled mantrips, was modified on August 12, 1980.
modification required that "all mantrips at this mine will be provided wi
properly maintained sanding devices sufficient to sand all wheels in both

ture. 4 FMSHRC at 1115, 1117-19. He attributed the likelihood of such i
such factors as the "wetness, albeit occasional, of the haulageway, the
d downgrades in the mine and the intrinsic danger of haulage travel itsel
FMSHRC at 1118.

The issue on review is whether substantial evidence supports the judge
nclusion that the violation was "of such a nature as could significantly
bstantially contribute to the cause and effect of a coal or other mine sa
health hazard." 30 U.S.C.§ 814(d)(1)(Supp. V 1981). 3/ We have previou
terpreted this statutory language as follows:

> [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

tional Gypsum, 3 FMSHRC at 825. Noting that the Mine Act does not define
azard," we construed the term to "denote a measure of danger to safety or
alth." 3 FMSHRC at 827. We stated further that a violation "'significan
d substantially' contributes to the cause and effect of a hazard if the
olation could be a major cause of a danger to safety or health. In other
rds, the contribution to cause and effect must be significant and
bstantial." Id. (footnote omitted).

In order to establish that a violation of a mandatory safety standard
gnificant and substantial under National Gypsum, the Secretary of Labor m
ove: (1) the underlying violation of a mandatory safety standard; 4/ (2)
screte safety hazard--that is, a measure of danger to safety--contributed
the violation; (3) a reasonable likelihood that the hazard contributed t

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The Mine Act's references to significant and substantial violations ar
ntained in sections 104(d) and (e), 30 U.S.C. §§ 814(d) & (e). The MSHA
spector's significant and substantial findings in this case were made in
nnection with a citation issued under section 104(a) of the Mine Act,
U.S.C. § 814(a), which does not expressly refer to this statutory phrase
thies has not challenged the propriety of including such findings in a
ction 104(a) citation, and we accordingly express no view on the issue in
is decision. We note, however, that the question is pending before us
Consolidation Coal Co., FMSHRC Docket No. PENN 82-203-R, etc.

We emphasize that this case involves the violation of a mandatory safe
andard. We have pending before us a case raising a challenge to the appl

serious. Mathies argues only that the evidence does not support a
either that one defective sander could contribute to a hazard or th
such hazard would involve a reasonable likelihood of injury.

The judge found that the violative condition, the defective sa
contributed to a hazard of a sliding derailment or collision with s
on the tracks. 4 FMSHRC at 1115. The record amply supports this f
Section 75.1403-6(b)(3) (n. 1 supra), which requires sanders on man
reflects a broad determination by the Secretary of Labor that a man
brakes by themselves do not always provide sufficient traction to p
derailment or collision and that sanders are necessary to provide a
stopping power. MSHA's modification of the 1972 notice of safeguar
Mathies (n. 2 supra) reflects a specific determination that conditi
the Mathies mine required that mantrips be equipped with properly m
sanding devices "sufficient to sand all wheels in both directions o
4 FMSHRC at 1112. These determinations support the conclusion that
brakes alone may not suffice to stop the mantrip at Mathies' mine,
are necessary to supplement the brakes and that a defective sander
contribute to a derailment or collision hazard.

Moreover, the record also establishes the existence of a hazar
of the citation. The damp conditions in the mine, the wet track, a
that the mantrip's route traversed curves and grades, created trave
September 22, 1981, that could have required the extra traction tha
intended to provide. The foregoing considerations establish the ex
hazard. We need not pass on the validity of the additional conside
on by the judge, of the "intrinsic danger" of haulage travel.

The remaining issue is whether the judge properly concluded th
was a reasonable likelihood that the hazard contributed to could re
injury. As we have noted in our discussion of the hazard, the man
route encompassed curves and grades. In addition to the chronicall
conditions at the mine, conditions were exceptionally wet on the da
citation was issued. If the dampness, curves, or grades had necess
use of the defective sander, the absence of sanding capacity could
a major cause of a derailment or a collision. We must be mindful o
that the mantrip carried miners, and we agree with the judge that
reasonably likely that such a loss of control would have exposed th
miners riding in the mantrip to the reasonably serious injury that
derailment or collision could entail. Thus, we concur with the ju
that the hazard contributed to by the violation created a reasonab
likelihood of injury, and that the violation was therefore a major
of a danger to safety.

take that exceptional step here. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 813 (April 1981). First, in light of our admonition that an inspector's judgment is an important element in making significant and substantial findings, (National Gypsum, 3 FMSH at 825-26), the judge gave appropriate weight to the inspector's judgmen Second, as the judge concluded, the inspector's testimony was "reasonabl logical and credible." 4 FMSHRC at 1115. The inspector observed condit first-hand, in contrast to Mathies' sole witness, its foreman, who conce he was present only part of the time. Moreover, the inspector's testimo was more specific than that of the foreman who could not remember the ex conditions that day. Thus, we conclude that the judge did not err in crediting the inspector's testimony as to the wet rail, the hazards crea by the loss of sanding capacity, and the likelihood of injury.

For the foregoing reasons, we affirm the judge's holding that the violation was significant and substantial.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

reasons expressed in my dissent in National Gypsum, supra, I di
with their analytical approach as set forth here and in that de

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ER A. SCHULTE :
:
v. : Docket No. YORK 81-53-DM
:
A INDUSTRIES, INC. :

DECISION

This case involves a discrimination complaint brought by Walter A. te against Lizza Industries, Inc. ("Lizza"), pursuant to the al Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. & Supp. V. 1981). At issue is whether Lizza's discharge of te on October 15, 1980, was in violation of section 105(c)(1) of et, 30 U.S.C. § 815(c)(1)(Supp. V. 1981). Following a hearing on erits, the Commission's administrative law judge determined that did not violate section 105(c)(1) and dismissed Schulte's com- t. 4 FMSHRC 1239 (July 1982)(ALJ). For the reasons that follow, firm the judge's decision.

Lizza operated a gravel quarry and preparation plant in Mount Hope, ersey, known as the Mount Hope Quarry. Lizza operated the quarry full-time basis, Monday through Friday, and with a reduced work on Saturday. Employees were required to report to work daily at a.m. The work day ended at 4:30 p.m. Lizza had a policy requiring yees to notify the operator between the hours of 6:00 a.m. and a.m. of unforeseen absences, in order that they might be excused. also had a policy requiring employees to work overtime each day. re to comply with either policy was grounds for disciplinary action.

Schulte was hired by Lizza on May 27, 1980. On September 10, 1980, te left work two hours early. Plant Manager Fred Oldenburg told Parzero, Schulte's foreman, to have a talk with him regarding his departure. Schulte previously had received two verbal warnings Oldenburg concerning his attendance in the period leading up to mber 23, 1980.

Schulte reported for work six to ten minutes late on both September d 24, 1980. On the first occasion, Oldenburg prepared a letter ing Schulte to the possible consequences of his actions and personally

altercation developed between Schulte and Parzero, his foreman, and disparaging remarks were exchanged. Ultimately, Oldenburg had to make peace between the two men. That same day, Oldenburg informed Schulte that he was being suspended without pay for three days.

On October 6, 1980, the first day of this three-day suspension, Schulte reported safety complaints to the Department of Labor's Occupational Safety and Health Administration and Mine Safety and Health Administration ("MSHA"). Apart from these documented complaints, Schu indicated at the hearing that he also reported safety complaints to bo his foreman and his shop steward. Both individuals denied the allega

Upon Schulte's return from the three-day suspension, Oldenburg ga him a letter, dated October 6, 1980, advising him of the suspension. Schulte acknowledged receipt of the letter and the accompanying postscript. 2/ On October 10, 1980, Schulte again left work one half hou

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1/ The body of the letter dated September 23, 1980, reads:

> Your attendance practices leave much to be desired. These pract cannot be tolerated. I am, therefore, formally informing you th if these practices continue you will be suspended and subsequent terminated. If you have any questions, please let me know.

The postscript reads:

> I hereby understand that if my poor attendance practices continu I will be suspended for three days and terminated thereafter if the practices continue.

2/ The body of the letter dated October 6, 1980, reads:

> Your attendanee practices and work attitude leave much to be desired. You have been warned about these practices, yet you continue to be insubordinate. You are therefore suspended without pay for three days. If your performance does not improve, your employment will be terminated. If you have any questions, please let me know.

The postscript reads:

> I hereby understand that if my poor attendance practices and wor attitude continue, I will subsequently be terminated.

to management that the miner's safety complaint which MSHA had received involved the guarding of the conveyor belt. Held did not identify Schu as the complainant. Schultc testified that Oldenburg, Parzero and Vincent Crawn, his shop steward, were present when he directed the MSHA inspectors to other alleged safety violations.

The decision to terminate Schulte was reached at a meeting of mana ment personnel on the second day of the MSHA inspection, October 15, 1980. Those participating included Oldenburg, Parzero, Crawn and senic company official James Granito. Both Oldenburg and Parzero admitted that at the time of the meeting they were aware of rumors that Schulte had initiated the MSHA inspection. At the hearing, Oldenburg testified that Granito may have brought up the fact that Schultc's discharge had absolutely nothing to do with the MSHA inspection.

Schultc was called into the meeting and discharged by Oldenburg, who gave him a letter detailing the reasons for his discharge. 3/ The two MSHA inspectors on the mine site were notified by management of Schulte's termination.

Following his discharge, Schulte's union filed a grievance on his behalf and the question of whether his dismissal was for just cause under the applicable collective bargaining agreement was submitted for

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3/ The body of the letter dated October 15, 1980, reads:

> You had been warned several times and subsequently suspended without pay as a result of poor attendance practices and insubordination. At a meeting held on Wednesday, October 15, 1980, you stated that your attitude had not improved and would not improve as a result of your no longer operating the bulldozer at our Mt. Hope plant.
>
> You were reminded on several occasions, and specifically on Thursday, October 9, 1980, by your foreman, Jesse Parzero, that your job required overtime each day. You have opted to neglect these instructions and have left your work area prior to the designated quitting time.
>
> Our prior verbal warnings, written warnings and disciplinary suspension have obviously failed to rehabilitate you. You have there fore left us no choice but to terminate your employment, effective today, October 15, 1980, at 1:30 p.m.

provisions of the Act had been violated and so informed Schulte on May 4, 1981. On May 14, 1981, Schulte filed his own complaint of discrimination directly with this independent Commission pursuant to sectic 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3). 5/ Three separate evidentiary hearings were held. On July 6, 1982, the Commission's judge issued his written decision dismissing Schulte's complaint. Both partic filed cross petitions for discretionary review, which we subsequently granted.

In reaching his decision, the judge employed the discrimination analysis which we enunciated in Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). The judge found Schulte's safety complaints to MSHA on October 6, 1980, constituted activity protected by section 105(c)(1) of the Act and, thus, that Schulte had established the first element of his prima facie case under Pasula. As to the second element of that case, whether Schulte's discharge by Lizza was motivated in any part by his protected activity, the judge found from the circumstantial evidence available that "it could very well be inferred that Mr. Schulte's discharge was at least partially motivated by his protecte activities." 4 FMSHRC at 1241. However, given the uncontradicted evidence regarding his work attendance, the judge further found that "while Lizza may very well have had a 'mixed motivation' for discharging Schulte, it had credible 'business justifications' to discharge Schulte exclusive of any protected activities and it clearly would have discharg Schulte in any event for his unprotected activities alone." 4 FMSHRC at 1244. The judge also found that Schulte's contention of disparate treatment, without credible evidence to support it, was not sufficient to rebut Lizza's affirmative defense. Id.

4/ The arbitrator's subsequent decision, dated February 23, 1981, was admitted as evidence at the hearing before the Commission's administrative law judge. Although the Commission judge did not refer to the arbitral decision in his own decision, we note in passing that the arbitrator concluded that Schulte was dismissed for a poor work attitude and attendance problems, and that his discharge was therefore for just cause within the meaning of the contract. This result accords with that reached by the judge.

5/ After investigation of a miner's complaint, the Secretary of Labor, acting through MSHA, is required to file a discrimination complaint with this Commission on the miner's behalf if he determines that the Act was violated. 30 U.S.C. § 815(c)(2). If the Secretary determines that the

concluding that Schulte established a prima facie case. We first addre the timeliness question.

Lizza initially raised its limitations defense before the judge during the last evidentiary hearing on April 16, 1982, and, again, by written motion prior to issuance of the judge's written decision. At the hearing, the judge expressed doubt about Lizza's own timeliness in raising the issue at that late stage of the proceedings. He seemed to be of the opinion that Lizza had waived the affirmative defense by not raising it in its pleadings and by proceeding with the hearing on the merits. Lizza maintained that it had not received a copy of the complaint Schulte originally filed with MSHA until April 5, 1982, when it obtained a copy from the Secretary pursuant to a Freedom of Information Act ("FOIA") request. Only then, Lizza asserted, was it able to ascert that Schulte's complaint was filed out of time. The judge did not specifically address Lizza's limitations defense in his decision. From the fact that the judge proceeded to decide the case based upon the merits, however, it appears, by necessary implication, that he rejected it. That is the construction of his decision which Lizza urges on review and is the one which we adopt.

Section 105(c)(2) of the Act establishes the relevant period of limitations:

> Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate....

30 U.S.C. § 815(c)(2)(emphasis added). In Herman v. Imco Services, 4 FMSHRC 2123 (December 1982), we held that the purpose of the 60-day tim limit is to avoid stale claims, but that a miner's late filing may be excused on the basis of "justifiable circumstances." We relied on the Mine Act's relevant legislative history, which states:

> While this time limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances

> of another agency or to his employer, or the miner fails to meet the time limits because he is misled as to or misunderstands his rights under the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in, Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978)(emphasis added). "Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of each case." Hollis v. Consolidation Coal Co., FMSHRC Docket No. WEVA 81-480-D, slip op. at 4 (January 9, 1984).

In the present case, Schulte filed his initial discrimination complaint with MSHA on January 15, 1981, 91 days after his discharge on October 15, 1980, and, thus, 31 days out of time. In its motion to amend its answer to include a period of limitations defense, Lizza apparently concedes that the reason Schulte did not file his complaint with MSHA on a timely basis was due to his ignorance of any such requirement. To support this contention, Lizza points to the transcript of MSHA's March 4, 1981, interview with Schulte, wherein Schulte stated

> Q. Are you familiar that there's a time limit on the discrimination complaint?
>
> A. No. I was not aware of that.
>
> * * *
>
> Q. Ok. Now, so you weren't familiar with the time limit on this?
>
> A. No, sir.

Operator's Exhibit 24, p. 4. On the basis of this uncontroverted evidence, we conclude that Schulte failed to file his complaint with MSHA within 60 days of the alleged violation because he was unaware of the Act's provisions in this regard.

We also conclude that the operator was not prejudiced by Schulte's 31-day delay in filing. Lizza's only claim of prejudice is that, due t the judge's failure to dismiss Schulte's complaint based upon its perio of limitations defense, it was required to expend the time and expense of litigating this case. While the expenditure of time and money involved in litigation should not be discounted, neither should it be overstated. Lizza has not demonstrated to us the kind of legal pre-

with then Chief Judge Broderick, concerning Schulte's May 14, 1981, complaint of discrimination pending before the Commission. MSHA's letter to Oldenburg of January 26, 1981, was appended to this letter. In the body of his letter, Lizza's attorney stated, "For your information Mr. Schulte had filed a complaint against the Company in January of this year in case No. MD 81-46."

A complaint filed by Schulte anytime in January 1981 would have been outside the 60-day limit. Lizza's August letter thus reveals that Lizza, in January of 1981, but certainly no later than in August of 1981, had actual notice of Schulte's late filing. This notice substantially predated receipt of its FOIA request in April 1982. 6/ Under these circumstances, Lizza's own delay of many months after it had such notice before complaining of Schulte's 31-day delay was tantamount to waiver of its period of limitations claim. Cf. Rule 8(c), Fed. R. Civ. P.

On the basis of the foregoing considerations, Schulte's delay in filing his complaint is excused. We emphasize, however, that although a miner's lack of understanding regarding his rights under the Mine Act is one of the circumstances that may possibly justify excuse of a delayed filing, any delay is a potentially serious matter. 7/

6/ While the document Lizza received from the Secretary pursuant to its 1982 FOIA request clearly identifies January 15, 1981, as the date Schulte's complaint was actually filed, MSHA's letter to Oldenburg dated January 26, 1981, nevertheless provided Lizza with sufficient independent information from which to determine the timeliness of Schulte's complaint. The newly discovered evidence did little more than advise Lizza that the complaint was actually filed 11 days earlier than it first might have been led to believe.

7/ This case is distinguishable from Herman and Hollis, supra, where the miners' late filings were not excused. The delay involved here was less than in those cases. In Herman, we concluded that the delay prejudiced the operator's ability to prepare and present its case. 4 FMSHRC at 2138-39. In Hollis, the Commission concluded (Commissioner Lawson dissenting on this issue) that the miner knew of his Mine Act rights, but deliberately chose to pursue other avenues of relief. Slip op. at 3-5.

vated in any part by the protected activity. In order to rebut a prim facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears an intermediate burden of production and proof with regard to these elements of defense. Thi further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unpr tected activity. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (Novem 1982). The ultimate burden of persuasion does not shift from the complainant. Secretary on behalf of Robinette v. United Castle Coal Co., FMSHRC at 818 n. 20. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discriminatio cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 76 L.Ed. 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983)(approving the Commission's Pasula Robinette test).

At this stage of the proceedings, no one disputes that Schulte engaged in protected activity. Lizza takes exception only to the judge's factual conclusion that it had knowledge of Schulte's protecte activity. It contends that such a conclusion is not supported by the evidence and, consequently, that the judge erred in holding that Schul had established his prima facie case.

In Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983), we stated that direct evidence of motivation is rarely encountered and that reasonable inferences of motivation may be drawn from circumstantial evidence showing such factors as knowledge of protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment. 3 FMSHRC at 2510. We also indicated that knowledge was probably the single most important aspect of a circumstantial case. Because knowledge also involves subjective factors, it may be proved by circumstantial evidence and reasonable inferences. Id. The judge evaluated the evidence and concluded that Schulte had made a prima facie showing on the issues of knowledge and motivation. The judge found that officials of Lizza "had some knowled albeit 'rumors', that Schulte had called in the MSHA inspectors," that there was a coincidence in time between the MSHA inspection and Schult discharge, and that the "peculiar gratuitous denial [by Granito] that

partially motivated by his protected activity. We find no persuasive reason to overturn the judge on this point. The next question is wheth Lizza affirmatively defended by showing that it would have discharged Schulte in any event for his unprotected activity alone.

The judge found that, although Schulte engaged in protected activi he also engaged in unprotected activity as well. The judge concluded that the uncontradicted evidence of Schulte's poor work attendance clearly supported Lizza's business justification for discharging him. Schulte argues that the judge erred by imposing on him, as complainant, the burden of proving disparate treatment. Schulte contends that once prima facie case has been established, the burden of proof shifts to th operator. Schulte also argues that the judge erred in concluding that he would have been discharged for his unprotected activity alone. He maintains that the evidence shows that the discipline meted out to him was not consistent with that given to other employees similarly situate He also asserts that the judge was extremely vague in analyzing the record evidence in this regard.

Regarding Schulte's burden of proof arguments, we indicated in Chacon, supra, that if a complainant wishes to allege disparate treatme it could serve as one of the possible bases of a prima facie case. 4 FMSHRC at 2412-13. It may also be presented by a complainant in order refute an operator's affirmative defense. 4 FMSHRC at 2517. In the latter instance, the ultimate burden of persuasion still remains with the complainant who must refute a facially meritorious affirmative defense in order to prevail. Robinette, 3 FMSHRC at 818 n. 20. Conver in bearing the intermediate burden of proof of establishing an affirmat defense, the operator is equally free to show consistent treatment. We do not read the judge's decision as requiring Schulte to prove disparat treatment. 4 FMSHRC at 1244. A prima facie case can be made without such a showing. In this case, the evidence presented by Schulte to demonstrate disparate treatment, however characterized theoretically, simply amounted to evidence to be weighed against the evidence favoring Lizza. The judge did so, and found Schulte's evidence lacking. We fin no merit in Schulte's argument regarding any possible misallocation of evidentiary burdens.

Turning to the merits of the issue of whether Schulte would have been discharged for his unprotected activity alone, we set forth in Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982), some of the indici tending to show that a miner's unprotected activity alone would have resulted in the disciplinary action taken:

> Ordinarily, an operator can attempt to demonstrate

Parzero, Oldenburg informed Schulte that he was suspended for three d without pay. During his suspension, Schulte engaged in his protected activity, that is, made his safety complaints to OSHA and MSHA. When returned to work, Schulte was given both written confirmation of the previous disciplinary action and admonished that termination would follow if his conduct did not improve. Furthermore, following the su pension, Schulte again was caught in the act of leaving work early an again was warned (orally) that severe disciplinary action could be provoked by such a violation of the rules. Lizza argues that, even w Schulte was discharged, he indicated to his supervisors that his atti would not improve as long as he was not permitted to work on the bull

On the specific issue of consistent treatment of other employees similarly situated, Lizza argues that even though it had been in operation for less than six months, two other miners had received wri warnings. Shortly after Schulte received his written warning, two ot miners were suspended for three days without pay under the same disci plinary policy. Lizza also notes that on the same day that Schulte w terminated, miner Boisvert was suspended for three days without pay f refusing to work overtime as required by the company.

To support his contention of disparate treatment, Schulte mainta that the timing of his discharge in relation to Lizza's treatment of seven other employees with similar attendance records is more than ju coincidence. Not one of these other miners was terminated as early a Schulte. The only other miner whose employment was terminated on a d even close to his own termination was Boisvert, who was terminated ni days after Schulte's discharge. Schulte also relies upon the fact th the three other miners actually discharged were not terminated until much later, specifically November 1980, April 1981, and September 198 and that the three remaining miners were never terminated and are sti employed by Lizza.

The judge credited Lizza's evidence. There is no question that Schulte had a poor attendance record, and indications are that he was also insubordinate. As a matter of bona fide company policy, Lizza employed a system of progressive discipline, which incorporated both notice and an opportunity to conform errant conduct. Schulte was war of the possibility of discharge and disciplined within the strictures established company policy. While the evidence concerning consistent and disparate treatment is not totally harmonious, the substantial

> Schulte claims that co-workers Harley, Bell, and Brock had attendance records as poor as his own but were not similarly discharged. The time cards for those employees are in evidence, however, and Schulte has not shown how those records support his argument. Moreover, from my own independent appraisal of those records, I do not find that they support Schulte's contention in this regard.

4 FMSHRC at 1244. While we can agree with Schulte that the judge was extremely brief in his analysis of the evidence regarding disparate treatment, we do not find his decision to be impermissibly vague. Both at the hearing level and on review, Schulte has failed to show specifica how the time cards in evidence support his position. Presented as raw data, the evidence is open to various interpretations. We will not disturb the interpretation adopted by the judge because, as we have already indicated, it is supported by substantial evidence.

In sum, the evidence shows that other miners received warnings, suspensions, and discharges under the company's disciplinary policy. Taken in conjunction with the evidence of Schulte's poor attendance and insubordination over a relatively limited period of time, we find substantial evidence to support the judge's conclusion that Lizza would have discharged Schulte in any event for his unprotected activity alone.

8/ At the hearing, Schulte testified that immediately following the meeting on October 15, 1980, when he was terminated, his foreman, Parzer stated to him "This is what you get, mister, for bringing in MSHA...." Parzero denied the statement. Boisvert, who was in the vicinity at the time, testified that he was not able to hear their conversation. Schul additionally testified that shop steward Crawn, stated to him, "[Y]ou stirred up a hornet's nest. It's a new company. They didn't need the trouble. That's why they routed you out." Had this evidence been credited, it would have cast severe doubt on Lizza's defense. The judg specifically discredited Schulte's testimony regarding Parzero and discounted his testimony regarding Crawn. Nothing appears in the recor that would support the extraordinary step of reversing these credibilit resolutions. 4 FMSHRC at 1241 n. 3. We also note that the record in this case does not support Schulte's further argument that Boisvert, terminated after Schulte's discharge, was also a victim of discriminati

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DAVID HOLLIS :
:
v. : Docket No. WEVA 81-480-D
:
CONSOLIDATION COAL COMPANY :

DECISION

This case arises under section 105(c) of the Federal Mine Safety & Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). In decision below, the Commission's administrative law judge dismissed the miner's discrimination complaint on the grounds that it had been untime filed and that the discharge of the miner by Consolidation Coal Company ("Consol") did not violate the Mine Act. 4 FMSHRC 1974 (November 1982) We affirm the judge's decision on both grounds.

The complaining miner, David Hollis, was employed at Consol's Osag No. 3 Mine, an underground coal mine located near Morgantown, West Virg Hollis was active in safety matters and in the affairs of Local Union 4 United Mine Workers of America, which represented miners at the mine. April 1980, Hollis was elected to the union safety committee. The Pres of the UMWA Local appointed him chairman of the committee, and he serve that capacity until his discharge on September 29, 1980.

The circumstances leading to Hollis' discharge occurred on Septemb 1980. At the end of the afternoon shift that day, Hollis and another m William Coburn, were waiting to take an elevator out of the mine. Holl confronted Coburn for attempting to leave work early and an altercation ensued. The evidence shows that Hollis was the instigator, or at best more aggressive of the two, in the incident. At some point, Hollis eit struck or grabbed Coburn. While riding up in the elevator with a numbe other miners, Hollis had to be restrained on several occasions from gra with Coburn. At the time of the altercation, Consol's mine rules prosc fighting and described it as a dischargeable offense.

On September 29, 1980, Consol discharged Hollis and Coburn for fig Both miners then filed grievances under the collective bargaining agree in effect at the mine. The arbitrator in Coburn's case ordered Coburn stated on the grounds that Coburn was the victim in the fight and that acted in self-defense. The arbitrator in Hollis' case issued a decisio October 20, 1980, upholding Hollis' discharge for fighting.

who had represented him before the arbitrator. Hollis decided not to appe and was subsequently advised by a law professor whom he consulted to retai a labor lawyer. Hollis did not do so for some time.

Hollis testified that in late March 1981, he was gathering informatio which he believed might be relevant to his Human Rights Commission case, a the Morgantown office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). Hollis also testified that it was at this point first learned of his right to file a complaint of discriminatory discharge under section 105(c) of the Mine Act, 30 U.S.C. § 815(c)(Supp. V. 1981). On April 7, 1981, Hollis filed his initial section 105(c) complaint with MSHA.

After investigating Hollis' complaint, MSHA made an administrative determination that his discharge did not violate the Mine Act and declined to file a complaint with this independent Commission on his behalf. Holli then filed his own discrimination complaint with the Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. § 815(c)(3). At the ensuing hearing before the Commission's administrative law judge, Consol moved to dismiss the case on the grounds that Hollis' initial complaint under the Mine Act, filed April 7, 1981, was untimely.

The Commission's judge concluded that Hollis' complaint was untimely under the 60-day time limit set forth in section 105(c)(2) of the Mine Act 30 U.S.C. § 815(c)(2). 4 FMSHRC at 1974-77. 1/ The judge discredited Hollis' testimony that he had been ignorant of his rights under the Mine Act until his March 1981 visit to the Morgantown MSHA office. 4 FMSHRC at 1976-77. The judge found instead that Hollis had known of his Mine Act remedies during the 60-day period following his discharge but had deliberately chosen to pursue other avenues of relief before filing his

1/ Section 105(c)(2) states in pertinent part:

> Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of [section 105(c)] may, within 60 days after such violation occurs, file a complaint with the Secretary [of Labor] alleging such discrimination....

30 U.S.C. § 815(c)(2)(emphasis added).

conduct in the fighting incident, and not because of his protected activities. 4 FMSHRC at 1978-96. The judge further concluded, however, that even if Hollis' termination were motivated in some part by his protected activities, the operator would have discharged him in any event for the fighting incident alone. 4 FMSHRC at 1996. We agree with the judge's conclusions.

We first address the timeliness of Hollis' initial section 105(c) discrimination complaint. In relevant part, section 105(c)(1) of the Mine prohibits the discharge of a miner, or other discrimination against him because of his exercise of any statutory right afforded by the Act. 2/ a miner believes that he has been discharged in violation of the Mine A and wishes to invoke his remedies under the Act, he must file his initi discrimination complaint with the Secretary of Labor within 60 days aft the alleged violation. 30 U.S.C. § 815(c)(2). 3/

2/ Section 105(c)(1) provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 [30 U.S.C. § 811 (Supp. V 1981)] or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

3/ After investigation of the miner's complaint, the Secretary is

60-day time limit states:

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate S committee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, 624 (1978)(emphasis added). Timeliness questions must be resolved on a case-by-case basis, taking into account the unique circumstances of eac situation.

In the present case, there is no dispute that Hollis was discharge on September 29, 1980, but did not file a complaint of discrimination w the Secretary until April 7, 1981, more than four months after the stat deadline for filing such a complaint. The judge did not find Hollis' c ignorance of his rights under the Act to be credible. 4 FMSHRC at 1977 Rather, the judge concluded that Hollis knew of his section 105(c) reme within the 60-day period following his discharge but deliberately elect seek other avenues of relief. The judge based these determinations, in upon the following findings:

> It is not disputed that [Hollis] had been an active, if not militant, chairman of the Safety Committee since his appointment by the local union in April 1980, and that in that capacity he frequently met with state and Federal (MSHA) safety officials. He had access to copies of the Federal law and Hollis himself asserts that he "knew the law" and had more knowledge of the Federal Mine Safety law than any other member of the Safety Committee. Moreover, the successor chairman of the Safety Committee, Edward Pugh, acknowledged that it was one of the duties of that position to advise miners of their rights under section

Health and Safety Act and the National Labor Relations Act, there are prohibitions against an employer taking disciplinary action against an employee for making charges or filing claims under the particular legislation." Operator's Exhibit 15, at p. 37.

When reviewing a judge's credibility resolutions, as here, our role is necessarily limited. The judge observed Hollis as a witness and did not believe his testimony of ignorance concerning his Mine Act rights. We discern nothing in the record that would justify our taking the extraordinary step of overturning this credibility resolution.

Furthermore, apart from Hollis' discredited testimony, substantial evidence supports the judge's inference that Hollis did know of his Mine Act rights during the 60-day time period. The record shows that Hollis was an aggressive safety committee member. He asserted that he "knew the law." During Hollis' tenure as safety committee chairman, he had filed over 30 safety complaints and had met frequently with federal and state officials on his own time to discuss safety matters. The inference from this evidence that Hollis knew of his section 105(c) remedy is convincing. Additionally, we are not prepared to say that the further inference of notice, which the judge drew from the arbitrator's decision, was impermissible.

We are cognizant of the fact that Hollis filed complaints with other agencies within 60 days from the date of his discharge. We conclude, however, as did the judge, that he pursued these alternate avenues of relief with knowledge of his section 105(c) rights. We do not believe that Congress, in the passage of legislative history quoted above, intended for us to excuse a miner's late-filing where the miner has invoked the aid of other forums while knowingly sleeping on his rights under the Mine Act.

In sum, the record affords ample support for the judge's findings that Hollis knew of his Mine Act rights but failed to exercise them within the statutory time restriction set forth in section 105(c)(2) of the Act. We therefore conclude that "justifiable circumstances" are not present to excu Hollis' serious delay in filing.

Moreover, even assuming the timeliness of Hollis' discrimination compl we also conclude that substantial evidence supports the judge's determination that Hollis was discharged for non-discriminatory reasons.

We first established the general principles for analyzing discrimination cases in Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation

it was also motivated by the miner's unprotected activities, and (2) that it would have taken the adverse action in any event for the unprotected activities alone. The operator bears an intermediate burden of production and proof with regard to these elements of defense. This further line of defense applies only in "mixed motive" cases, i.e., cases where the advers action is motivated by both protected and unprotected activity. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burde of persuasion does not shift from the complainant. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 20. The Supreme Court recently approved the National Labor Relations Board's virtually ide analysis for discrimination cases arising under the National Labor Relatio Act. NLRB v. Transportation Management Corp., 76 L.Ed. 2d 667 (1983). Se also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983)(approving the Commissio Pasula-Robinette test).

In this case, there is no dispute that Hollis engaged in protected activity, largely in the form of making safety complaints, prior to his termination. The judge concluded, however, that Hollis was discharged solely for his unprotected conduct in the fighting incident. On review, Hollis argues that the judge erred in relying to some extent on the arbitrator's findings concerning the fight and Consol's reasons for firing him. Hollis also asserts that the judge erred in his analysis of Consol's motivation for the discharge. We find these contentions lacking in merit.

In Secretary on behalf of Pasula v. Consolidation Coal Co., supra, we held that in discrimination cases our judges may admit arbitral decisions and accord them such weight as may be appropriate. 2 FMSHRC at 2794-96. 4 We indicated that according weight to the findings of arbitrators may aid the Commission's judges in finding facts under our Act, "'especially ... where the issue is solely one of fact, specifically addressed by the parti and decided by the arbitrator on the basis of an adequate record.'" 2 FMS at 2795, quoting Gardner v. Alexander-Denver Co., 415 U.S. 36, 60 n.21 (1974)(emphasis added).

4/ In line with the Supreme Court's analogous approach in Alexander v. Gardner-Denver, 415 U.S. 36 (1979), we declined to enunciate rigid standards governing the weight that should be accorded arbitral findings. We indicated, however, that relevant factors for determining the appropriate weight included such considerations as whether the arbitrator had addressed the miner's Mine Act rights; the similarity, if any, between relevant rights under the collective bargaining agreement and the Act; whether the findings in question were factual in nature; the adequacy of

findings (4 FMSHRC at 1980-81 & n. 5), and we agree with him that the criteria are satisfied. We perceive no error in the judge's reliance on the arbitrator's decision concerning the factual issues of the fight and Consol's reasons for discharge. Moreover, the judge himself reviewed the record de novo and arrived at the same conclusions reached by the arbitrato 4 FMSHRC at 1981. 5/

With respect to the merits of the discrimination case, it is clear tha Hollis was the instigator of the fight with Coburn on September 26, 1980. The judge incorporated the arbitrator's detailed findings on this point (4 FMSHRC at 1981-88), which included Hollis' admission that the confronta- tion got out of hand and that his conduct set a bad example. 4 FMSHRC at 1985. Moreover, in Coburn's arbitration proceeding, the UMWA Local representing Hollis argued that Hollis was the aggressor in the fight and Coburn, the victim. The arbitrator of the Coburn grievance agreed.

The judge also found that Hollis, prior to September 26, 1980, had notice of the operator's rules of conduct, and that one of the rules stated that "fighting is a dischargeable offense." Operator's Exhibit 6. Hollis argues that the operator did not strictly enforce the rules of conduct until the fighting incident. The record discloses, however, that following raucous 1979 Christmas party, the union requested mine management to do som thing about the fighting at the mine. Tr. 813, 944. The mine superintende replied that something would be done, and thereafter the rules were tighter and fighting was expressly labeled a dischargeable offense. Tr. 65-66. We conclude, as did the judge and arbitrator, that management was impelled to enforce strictly the fighting rules because the union wanted the fighting at the mine stopped. We also concur with the judge that Hollis' fight with Coburn "was a serious breach of the known rules of conduct of a severity

5/ Hollis claims that certain evidence adduced at the hearing before the judge had not been introduced at the arbitration hearing and, accordingly, should have been considered by the judge in deciding the issues surrounding the discipline over the fighting incident. The judge did take this evidenc into account:

> While the evidence developed at the hearing before me provided some greater detail than was available to the arbitrator, there is nothing in that addi- tional evidence that would warrant any change in the analysis and conclusions of these incidents made by the arbitrator.

satety complaints and his discharge. Even had a prima facie case of discrimination been made out, however, we find that substantial evidence supports the judge's further finding that Consol affirmatively defended by proving that Hollis would have been fired anyway solely on the basis of the fighting incident.

For the foregoing reasons, we affirm the judge's dismissal of the discrimination complaint. 7/

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

6/ Pointing to Coburn's reinstatement, Hollis also maintains that he was the victim of disparate treatment. In the Hollis arbitration decision, the arbitrator found that "[t]here was nothing in the record to raise any inference that the employer prosecuted the case against Mr. Coburn with any less vigor than it has this case." Operator Exhibit 15, at p. 34. After review the record, we agree.

7/ Certain exhibits, introduced and received into evidence before the judge were not contained in the record before us on review. Accordingly, we issued an order directing the parties to submit these exhibits so that the record could be made complete. The parties did so, and we have accepted the exhibits and made them part of the record.

ubstantial evidence supports the judge's finding that Hollis was
ischarged solely for his unprotected conduct in the fight out of which
his case arose. I disagree with their conclusion that the complaint
as untimely filed. The majority has determined that Hollis "knew of
is section 105(c) remedy", because "he had filed over 30 safety com-
laints and had met frequently with federal and state officials on his
wn time to discuss safety matters, and "...was knowingly sleeping on
is rights." They found "convincing" the inference from this evidence
hat Hollis knew of his Mine Act rights, and credited the "further
nference of notice which the judge drew from the arbitrator's decision".
lip op. at 5.

The difficulty with this double inference analysis is that the only
vidence of record on the question of Hollis knowledge of 105(c) is the
nshaken denial thereof by the complainant. Nor did any witnesses testify
o the contrary. Tr. 668, 701-704. The record thus confirms that complaina
as unaware of his 105(c) rights until a few days before he actually filed
he complaint. TR. 666, 668. 4 FMSHRC 1975. This is unsurprising,
iven Hollis' short tenure as a member of the safety committee, and the
ncontroverted testimony that no 105(c) cases had ever arisen at this
ine, either during Hollis' committee service, or in the seventeen years
receding Hollis' discharge. Tr. 891, 904. There is no dispute that
iling was promptly had, once, as complainant testified, he became aware
f his 105(c) rights. No reason appears evident why a miner as "aggressive"
s Hollis would not have filed under 105(c) if he were aware of such: the
ogical inference would appear to be to the contrary.

Indeed, counsel for the operator conceded that Consol "...cannot
ring forth any direct evidence that he (Hollis) did have knowledge (of
is 105(c) rights) but...it is reasonable to assume that he would know
ection 105(c)". Tr. 6.

In Schulte v. Lizza Industries, Inc., ____FMSHRC____ (issued today), my
olleagues agreed with me that the miner's testimony that he was ignorant
f 105(c)'s timeliness strictures, conceded by the operator in that case
lso, was a consideration sufficient to excuse a (31-day) delay in filing
he complaint. In the instant litigation, however, identical ignorance is
ound by the majority to be insufficient, notwithstanding this operator's
dmitted inability to present any contrary evidence.

Our standard of review is the familiar one of "substantial evidence",
equired in most federal administrative proceedings. Section 113(d)(2)(A)(i
ubstantial evidence has been defined as "more than a mere scintilla...mere
ncorroborated hearsay or rumor does not constitute substantial evidence";
it must do more than create a suspicion of the fact to be established".

indeed, "wholly barren of evidence", and fails to meet the test of substantial evidence.

The language of the Act as to time limits, of course, is precator not mandatory: "Any miner ... who believes that he has been ... discriminated against by any person in violation of the subsection may, within 60 days after such violation occurs, file a complaint with the Secretary...." Section 105(c)(2). (Emphasis added.) This language i obviously not accidental, as the majority concedes, the judge below acknowledged, and the legislative history makes evident. Slip op. at

This operator was unable to demonstrate any prejudice it suffered because of the fact that miner Hollis did not file his complaint withi 60 days. Tr. 815-822. Nor, as the record reveals, was Consol able to show that any instruction was ever given by it to Mr. Hollis concernin the time limits for filing claims under section 105(c). Tr. 863. The is no dispute that Hollis had brought his complaint to the attention o not only his employer, through the contractual grievance procedure, bu to the West Virginia Human Rights Commission, and the National Labor Relations Board as well.

This miner had thus indisputably met at least two of the three tests enumerated in the legislative history (slip op. at 4), either of which would have been sufficient under the guidelines set forth in the legislative history. As we noted in the analogous decision of UMWA v. Consolidation Coal, 1 FMSHRC 1300, 1302 (September 1979): 1/

> In interpreting remedial safety and health legislation, "[i]t is so obvious as to be beyond dispute that ... narrow or limited construction is to be eschewed ... [L]iberal construction in light of the prime purpose of the legislation is to be employed." St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines, 262 F.2d 378, 381 (3rd Cir. 1959); Phillips v. Interior Board of Mine Operations Appeals, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). We believe that a liberal construction of the 30-day filing period for compensation claims requires

1/ Herman v. Imco Service is inapposite (slip op. at 6). There the mi

Technology, 581 F.2d 1287 (7th Cir. 1978); Moses v. Falstaff Brewing Corporation, 525 F.2d 92 (8th Cir. 1975).

Furthermore, while section 111 of the 1977 Act does not specify a time limit for the filing of compensation claims, the Act's discrimination provisions contain analogous time limits.

The majority's approval of the judge's further reliance on the arbitrator's minimal mention of the Act, (as well as the National Labor Relations Act, to which this miner had already resorted), is even less explicable. On its face that decision provides no notice of either section 105(c) or the time limits thereunder, and obviously makes no reference to remedies under the Act. Slip op. at 5. In any event, many of the Act's prohibitions are enforceable only by the Secretary, not by an individual miner (see e.g., sections 104, 108, 109 and 110). 2/ Further, contrary to the judge's finding, the arbitrator did not reject Hollis "claim that he had been fired for activities protected by the Act". 3/ The only section of the Act referred to by the arbitrator was section 103(g), which has no bearing on the issue here disputed. Dec. at 4. Obviously, the arbitrator had no authority or jurisdiction to rule either for or against this miner on any issue over which the Commission has jurisdiction.

Imputing knowledge of 105(c) to this, or any other, miner thus has no precedential support, and is contrary to both the spirit of the Act and its legislative history. The latter, and not by inference, clearly sanctions filing 105(c) complaints even though 60 days may have passed. Slip. op. at 4.

The majority's upholding the judge's finding of Hollis knowledge consequently only affirms judicial speculation, not record evidence. It is, under the rationale adopted here today, apparently insufficient now for a miner to present uncontroverted evidence that he or she had no knowledge of section 105(c). The trier of fact may henceforth find knowledge, notwithstanding the absence not only of affirmative testimony, but the existence of testimony to the contrary. This error is especially egregious here, given the assertion that the miner "should have known" of his rights, and the judge's failure to comment on Hollis' demeanor, or to find him to be unpersuasive or untrustworthy. Hollis' "access to copies of the Federal law ... his safety committee chairman successor's

2/ The judge, without explanation, asserts that the arbitrator's decisio

the burden of proof allocations so carefully constructed in Pasula and Robinette, supra, and their requirement that the employer must justify disciplinary action. See also National Labor Relations Board v. Transportation Management Corp., 51 U.S.L.W. 476 (June 15, 1983). The majority's ready acceptance of the judge's "inference" that Hollis "knew" of his section 105(c) remedy, and additional "inference" of notice drawn from an arbitrator's decision such as this, thus impermissibly eases an operator's duty to present the evidence necessary to establish a non-discriminatory motive for any discharge or other discipline it chooses to impose.

Mere assertion that this miner "should have known of his rights under the Act to file complaints", supra, (Dec. at 4), is not evidence, much less substantial evidence. Although the judge and the majority here seek to frame the issue in credibility terms, there is no escaping the fact that this record is devoid of any evidence Hollis knew of the existence of section 105(c), much less its time filing requirements.

I therefore dissent from the majority's holding that the filing hereunder was untimely, but concur in the dismissal of the complaint.

A. E. Lawson, Commissioner

Fairmont, West Virginia 26554

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 80-116-R WEVA 80-117-R WEVA 80-118-R WEVA 80-659
v.	:	
CONSOLIDATION COAL COMPANY	:	

DECISION

This consolidated proceeding prcsents the question of whether violations cited in a section 104(d)(1) citation were significant a within the meaning of Cement Division, National Gypsum Co., 3 FMSHR 1981). The Commission's administrative law judge concluded that th by Consolidation Coal Company ("Consol") were significant and subst affirmed the citation. 4 FMSHRC 747 (April 1982)(ALJ). 1/ We gran petition for discretionary review, which challenged only the judge' and substantial findings. For the reasons that follow, we affirm.

1/ This same proceeding was originally before another Commission tive law judge, who affirmed the citation after finding a significa substantial violation under the then-applicable, pre-National Gypsu 2 FMSHRC 2862 (October 1980)(ALJ). We declined to grant Consol's p review of that decision. Thereafter, Consol petitioned the United of Appeals for the Fourth Circuit for review of the judge's decisio become a final decision of the Commission pursuant to 30 U.S.C. § 8 V 1981). The Court remanded the case with instructions that the Co reconsider the issues in light of our intervening decision in Natio supra. Consolidation Coal Co. v. FMSHRC, No. 80-1862, 4th Cir., Oc 1981 (unpublished opinion). Because the Commission judge who orig the case had left the Commission, the case was reassigned on remand judge whose dccision is now before us on review.

> The approved mine roof control plan was not being followed in 4 Right 5 North section (037) and on the section supply track in that roof bolts were spaced from 4 feet 7 inches to 7 feet 6 inches apart and from bolt to coal rib in approximately 350 different locations that were measured in the (intake air) No. 1 entry from 30 to 33 room and 31, 32, and 33 rooms, and in the track from 6 to 18 stopping for a total of approximately 1500 feet in length and more bolts may be spaced wide....

The inspector included in the citation his findings that the violations significant and substantial and were caused by the operator's unwarranta failure to comply with the standard.

As alleged by the inspector, the spacing of roof bolts in about 350 tions in the 4 Right 5 North working section exceeded the 4 foot-6 inch permitted by Consol's roof control plan. The greatest concentration of wide bolts, including some that were 7 feet or more apart, was along the section's supply track. The inspector testified that although roof cond generally were good, the roof was cracked, loose, or unsupported between in three unspecified locations and could fall at any time. A roof fall by a clay vein had occurred under supported roof when Consol first advan section, in about August or September 1978. Roof falls also had occurre unsupported areas of the section. Two witnesses had observed pieces of rock under supported roof at unspecified times and in unspecified locati One of these witnesses had heard of employees receiving minor laceration pieces of falling rock. However, no lost-time injuries from roof or roc apparently had been reported in this section.

All miners working in the section had been exposed to the over-wide on every shift for at least six months, because they walked under the w spaced bolts in the supply track on the way to the dinner hole and the storage area. Fewer employees than the normal production crew of 7-8 we working in the section on October 30, 1979, when the citation was issued Consol had voluntarily closed the section on October 26 after receiving citation that day for roof bolting violations. Nonetheless, on October at least one mechanic and one maintenance foreman were working in the section, and an unspecified number of roof bolters were also abating violations there.

2/ In relevant part, 30 C.F.R. § 75.200, a mandatory safety standard with roof control, requires operators to adopt and comply with roof con plans approved by the Secretary of Labor.

fall and that widely-spaced bolts increased the possibility of roof fa
He also relied on the inspector's testimony that the roof was loose, c
or unsupported in three locations and could fall at any time.

The judge narrowly interpreted the original judge's finding that
was no evidence of roof cracks, splits, or loose bolts, as not includi
widest-spaced bolts in the supply track. 4 FMSHRC at 769-70. In the
view, the fact that employees had worked and traveled safely in the se
six months prior to the October 30 citation did not prove the absence
hazard which could result in a serious injury. In this regard, he not
after the initial October 26 citation, a considerable amount of additi
bolting had been necessary and that the abatement work was proceeding
day of the section 104(d)(1) citation. 4 FMSHRC at 769. Therefore, t
judge concluded that there was

> a reasonable likelihood that the hazards presented by the widely-spaced roof bolts as well as the areas described by the inspector as being loose between the bolts at several locations, constituted a significant and substantial hazard to those miners working and traveling through the cited areas. The danger presented was a roof fall, particularly in the track entry, where the roof bolt spacing was the widest, and the real potential for a fall in any of the locations was the direct result of the violation.

4 FMSHRC at 770.

The sole question before us is whether the roof control violation
"of such a nature as could significantly and substantially contribute
cause and effect of a coal or other mine safety or health hazard." 30
§ 814(d)(1). We have previously interpreted this statutory language a

> [A] violation is of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

National Gypsum, 3 FMSHRC at 825. Noting that the Mine Act does not d
"hazard," we construed the word to "denote a measure of danger to safe

tary of Labor must prove: (1) the underlying violation of a mandatory sa
standard; 3/ (2) a discrete safety hazard--that is, a measure of danger t
safety--contributed to by the violation; (3) a reasonable likelihood that
hazard contributed to will result in an injury; and (4) a reasonable like
that the injury in question will be of a reasonably serious nature. Math
Coal Co., FMSHRC Docket No. PENN 82-3-R, etc., slip op. at 3-4 (January 6
1984).

On review, Consol does not contest the first and fourth elements of
that is, the judge's finding of a violation or the reasonably serious nat
the injury. Rather, Consol argues that the evidence does not support the
conclusions that the over-wide spacing between the roof bolts could contr
to a hazard, and that there was a reasonable likelihood any such hazard w
result in injury. We disagree.

As to Consol's first argument, substantial evidence amply supports
judge's finding that the large numbers of over-wide roof bolts created a
of roof falls. Mine roofs are inherently dangerous and even good roof ca
without warning. 4/ As Consol's roof control plan states, the plan merel
establishes the minimum requirements for adequate roof support. Exh. G-1

3/ We note that this case involves a violation of a mandatory safety standard. Pending before us is a case which challenges the application o National Gypsum to a violation of a mandatory health standard. Consolida Coal Co., FMSHRC Docket No. WEVA 82-209-R, etc. We intimate no views at time as to the merits of that question.

4/ Roof falls have been recognized by Congress, the Secretary of Labor, industry, and this Commission, as one of the most serious hazards in mini As we have stated:

> A prime motive in enactment of the 1969 Coal Act was to "[i]mprove health and safety conditions and practices at underground coal mines" in order to prevent death and serious physical harm. One of the problems that greatly concerned Congress was the high fatality and injury rate due to roof falls. The legislative history is replete with references to roof falls as the prime cause of fatalities in underground mines. [Citations and footnotes omitted.]

Eastover Mining Co., 4 FMSHRC 1207, 1211 & n. 8 (July 1982).

(Footnote continue

oreman conceded that such overwide spacing increased the possibility of
alls. 4 FMSHRC at 769; Tr. 74. Further, the operator did not rebut the
nspector's testimony that in three locations the roof was cracked, loose,
nsupported, and could fall at any time. Thus, we conclude that despite t
enerally good conditions and the absence of reportable injuries in the
revious six months, these over-wide bolts created "a measure of danger to
afety or health." National Gypsum, 3 FMSHRC at 827. We therefore affirm
he judge's holding that there was a hazard.

The remaining question is whether the judge properly concluded that t
as a reasonable likelihood that the hazard contributed to by the roof con
iolations would result in injury. Substantial evidence also supports thi
onclusion. The widely-spaced bolts found in 350 locations on October 30,
n some instances up to 3 feet wider than permitted, represented a serious
eviation by Consol from the minimum requirements of its roof control plan
As the judge noted, bolts were too widely spaced in these 350 locations
ven after Consol had added 140 bolts as a result of the October 26 citati
his large number of widely-spaced bolts and the often considerable distan
etween the bolts amounted to a widespread and serious departure from the
inimum requirements for adequate roof support in the mine. Such major no
ompliance dangerously increased the likelihood of roof fall accidents.

As noted above, every miner on every shift for six months was exposed
he hazard created by the over-wide bolts along the supply track. The fa
hat no one was injured during that period does not ipso facto establish t
here was not a reasonable likelihood of a roof fall. There was testimony
o past falls, and the inspector also stated that there was bad roof in th
ocations in the section. While fewer miners than usual were in the secti
n October 30 (because Consol had closed the section on October 26), at a
inimum the mechanic and the maintenance foreman working there were expose
o the hazard. Had a roof fall occurred, there is a reasonable likelihood
f injury because of this exposure. In light of the foregoing, we affirm
he judge's holding that a reasonable likelihood existed that the hazard
ontributed to by the roof control violations would result in injury, and
onsequently that the violations were a major cause of a danger to safety.

---

n. 4/ continued

Roof falls remain the leading cause of death in underground mines.
espite decreased production and an overall decline in fatalities from 198
o 1982, fatalities resulting from falls of roof, face, and rib in under-
round coal mines increased from 41 deaths in 1981 to 52 deaths in 1982.
ine Safety and Health Administration, U.S. Department of Labor, Mine
njuries and Worktime, Quarterly 17 (Closeout Ed. 1981); Mine Safety and

which elevated the likelihood of serious injury, is indeed the type of si
we contemplated in National Gypsum. 3 FMSHRC at 825-27.

For the foregoing reasons, we affirm the judge's holding that the vi
tion was significant and substantial.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

L. Clair Nelson, Commissioner

Commissioner Lawson concurring:

I agree with the majority as to the result reached and in their affirmance of the decision of the judge below. However, for the reasons expressed in my dissent in National Gypsum, supra, I disagree with their analytical approach as set forth here and in that decision.

A. E. Lawson, Commissioner

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 81-385-M
ENERGY FUELS NUCLEAR, INC.	:	

DECISION

This case involves an alleged violation of 30 C.F.R. § 57.6-116, a mandatory blasting standard. A Commission administrative law judge held that the operator, Energy Fuels Nuclear, Inc. (EFNI), did not violate the standard, and vacated the citation. 4 FMSHRC 1970 (November 1982)(AL We granted the Secretary of Labor's petition for discretionary review. For the reasons that follow, we reverse.

On September 9, 1980, Bryan Tate, a contract miner at EFNI's underground uranium mine, was injured in a blasting accident. A Department of Labor Mine Safety and Health Administration (MSHA) inspector issued a citation the following day after completing an accident investigation. The citation alleged a violation of 30 C.F.R. § 57.6-116, which provides:

> Mandatory. Fuse shall be ignited with hotwire lighters, lead spitters, igniter cord, or other such devices designed for this purpose. Carbide lights shall not be used to light fuses.

On the day of the explosion, Tate drilled about 50 holes in the face and 20 holes in the rib. Working alone, he loaded the holes with explosives with full knowledge of the operator's requirement that two miners be present when loading explosives and lighting fuses. See 30 C.F.R. § 57.6-114. Before igniting the fuses, Tate lit a test fuse to determine how long it would be before the first fuse lit in the round

knocking him to the ground. A 10-12 second delay in the firing of second two holes, instead of the anticipated 4-5 seconds, permitted to crawl around the corner before the remainder of the round went o When the rest of the explosives detonated, Tate was injured by flyi rock. 3/

The judge concluded that the Secretary did not establish a vio of the cited standard. He reached this result even though both par had agreed at the hearing that the standard prohibits lighting of t lite connectors with a torch, and even though the operator stated i post-hearing brief that it did not deny the fact of violation. The judge construed the standard literally. He distinguished between t lite connectors and safety fuses. Because he found that Tate used torch to light the thermalite connectors and that the connectors in

---

1/ From the record it is not clear which type of torch was used, the conflict is immaterial for purposes of our review.

2/ A thermalite connector is a small metal capsule about 1 to 1-1 inches long, filled with an ignition compound that burns with inten heat when ignited. One end of the thermalite connector is crimped a safety fuse. The other end has a lip that can be pressed down to secure igniter cord passed under the lip if multiple fuses are to b linked together. Igniter cord is a "fuse, cordlike in appearance, burns progressively along its length with an external flame at the of burning, and is used for lighting a series of safety fuses in th desired sequence." 30 C.F.R. § 57.2. Igniter cord is marked at on foot intervals, so a series of explosions can be detonated accordin the burning rate of the cord. Thermalite connectors can be attache different points along a length of igniter cord. The miner lights end of the igniter cord and leaves the blasting area. The cord bur a speed determined by the burning rate of the particular cord used, igniting each thermalite connector seriatim. The ignition of the c pound in the connectors instantaneously ignites the safety fuses. FMSHRC at 1970; Exh. P-2.

3/ The flying rock tore a hole in Tate's back about 3 inches wide 1-1/2 inches deep. According to Tate, he tried to return to work t next day but was given three days off for disciplinary reasons.

constitute a violation. The purpose of section 57.6-110 is to accomplish fuse ignition in a safe manner. Safety fuse burns inside its cover. Consequently, there can be difficulty in determining if the fuse, rather than just the cover, has been lit and precisely when ignition of the fuse occurred. When a miner does not know with certainty whether, or for how long, a fuse is burning, he may fail to leave the blasting area in time. The fuse ignition devices specified in the standard accomplish safe and reliable fuse ignition by means of an intensely hot flame and a heat source that does not obscure or conceal evidence of the ignition "spit," a visible jet of flame that shoots out of the safety fuse at the moment its powder core is ignited. 4/ The evidence shows that use of an open-flame torch, such as that used in the present case, may obscure the ignition spit emitted by the safety fuse. Thus, ignition of a safety fuse by use of a torch defeats the purpose of the standard by preventing a miner from accurately determining when and if he has ignited the fuse.

4/ The problems attendant to ignition of safety fuses are described in Exhibit P-6, the E.I. duPont de Nemours and Co., Blasters' Handbook, 175th Anniversary Ed. (1977):

> The powder core of safety fuse burns inside its wrapping and cannot be seen after the fire from the initial spit. Some brands emit smoke through the wrapping as the powder burns. Visual discoloration on the outside of the fuse is readily apparent; however, this may be some distance behind the point of the burning core. For this reason it is not a reliable indication of where the core is burning. The end spit is a jet of flame about two inches long that shoots out of the end of the fuse the moment it is lighted. It lasts at least a second and is followed by smoke which rises from the end of the fuse.
>
> Here are some important reminders:
>
> The fuse burns at the core and not at its cover. The cover may burn without the ignition of the core. When properly ignited, the core ignites with a jet of flame called the "ignition spit". This spit shows the core is lit. Practice ignition until you know the ignition spit. Persons who fail to recognize the ignition spit, or who are misled by the burning of the cover, have been killed or injured by trying to relight fuse which has been ignited.

be obscured or concealed by the ignition source. The record in case indicates that application of the open-flame torch to the t lite connectors could obscure the spit and result in uncertainty when and if the safety fuse ignited. Thus, in the present case, precise hazard sought to be avoided by the standard is created b miner's application of an open-flame torch to thermalite connect attached to safety fuses. Keeping in mind that we are interpret mine safety standard, we conclude that on the facts of this case judge erred in interpreting the standard too narrowly. Rather, that the miner's application of an open-flame torch to thermalit connectors attached to the ends of safety fuses defeats the purp is contrary to the intent of 30 C.F.R. § 57.6-116. Therefore, o facts of this case we find a violation.

Accordingly, the judge's decision is reversed, the citation reinstated, and the case is remanded for assessment of an appro civil penalty.

Roscmary M. Collyer, Chairman

Richard V. Backley, Commissio

Frank F. Jestrab, Commissione

A. E. Lawson, Commissioner

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ADMINISTRATIVE LAW JUDGE DECISIONS

HARRY J. GILPIN, Complainant	:	DISCRIMINATION PROCEEDI
v.	:	Docket No. PENN 84-5-D
BETHLEHEM MINES CORPORATION, Respondent	:	MSHA Case No. PITT CD 8
	:	Marianna Mine No. 58

ORDER OF DISMISSAL

Before: Judge Broderick

On November 2, 1983, Complainant filed documents with Commission which were accepted as a complaint of discrimina under section 105(c) of the Federal Mine Safety and Health of 1977 (the Act). The documents included a copy of the original complaint filed with MSHA dated July 27, 1983. Th complaint alleges that Respondent Bethlehem Mines Corporati (Bethlehem) has had a policy of requiring miners to pass a welding test before being awarded jobs as mechanics. On Ju 1983, employees were awarded jobs as mechanics without taki and passing the welding test. During the week of January 1 1983, Complainant bid on a mechanic's job and was told that must take and pass the welding test before he would be awar the job. Complainant contends that this is discrimination that some employees have to take and pass the welding test becoming mechanics and some do not. In his letter to the Commission, Complainant states that he should have been awa the job, being the senior employee.

On December 8, 1983, Respondent filed an answer, a Mot to Dismiss, a Memorandum of Law in Support of the Motion to Dismiss, and a Motion for a Protective Order. Complainant, is not represented by counsel, has not responded to the mot

A complainant appearing pro se is not held to the same pleading requirements that might be expected of a lawyer. must, however, assert a claim under the Act. The Mine Act not protect an employee from all forms of discriminatory co

There is no hint in the documents submitted to the Co that Complainant was denied a promotion or a job opportuni because he made safety complaints. Rather, he complains o generally unfair application of job promotion rules and fa to follow seniority rules. These are not matters within t jurisdiction of the Commission. See Lane v. Eastern Assoc Coal Corp., 2 BNA MSHC ¶ 1082 (1980) (ALJ).

Because I find that the complaint herein does not sta cause of action under section 105(c) of the Act, this proc is DISMISSED.

James A. Broderick
Administrative Law Judge

Distribution:

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R. Henry Moore, Esq., Rose, Schmidt, Dixon & Hasley, 900 C Building, Pittsburgh, PA 15222 (Certified Mail)

ITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF ENRY BEARD, Complainant v. DWESTERN MINING & RECLAMATION, INC., Respondent	:	DISCRIMINATION PROCEEDINGS Docket No. CENT 83-44-D Bronaugh Mine
ITED MINE WORKERS OF AMERICA (UMWA), ON BEHALF OF RRY LOUDERMILK, Complainant v. DWESTERN MINING & RECLAMATION, INC., Respondent	:	Docket No. CENT 83-45-D Bronaugh Mine

ORDER OF DISMISSAL

efore: Judge Broderick

In each of the above cases, the Complainants filed motions withdraw their respective discrimination complaints on the rounds that the issues raised in these proceedings have been ddressed and remedied by the NLRB in cases brought before that ribunal.

Respondent does not object to the motion.

Therefore, IT IS ORDERED that the motions are GRANTED and hese proceedings are DISMISSED.

James A. Broderick
James A. Broderick
Administrative Law Judge

	:	Docket No. WEST 86-491-
v.	:	
	:	MSHA Case No. ID 05-003
MID-CONTINENT RESOURCES, INC.,	:	
Respondent	:	Dutch Creek No. 1 Mine
	:	

ORDER OF DISMISSAL

Before: Judge Carlson

In response to an order to show cause why this discri ation case should not be dismissed for lack of prosecution complainant has filed a motion to withdraw his complaint.

Pursuant to Commission Rule § 2700.11, the motion is granted. Accordingly, the complaint is dismissed with pre and this proceeding is terminated.

SO ORDERED.

John A. Carlson
Administrative Law Judge

Distribution:

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J. Davitt McAteer, Esq., Center for Law and Social Policy 1751 N Street N.W., Washington, D.C. 20036 (Certified Mail

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. PENN 83-28 A.C. No. 36-00856-03504
v.	:	
	:	Rushton Mine
RUSHTON MINING COMPANY, Respondent	:	

DECISION

Appearances: Mark V. Swirsky, Esq., Office of the Solicit
U.S. Department of Labor, Philadelphia, Penn
sylvania, for Petitioner;
Joseph T. Kosek, Jr., Esq., Rushton Mining C
pany, Ebensburg, Pennsylvania, for Responden

Before: Judge Melick

Hearings were held in this case on November 15, 1983, Philipsburg, Pennsylvania. A bench decision was thereafter dered and appears below with only non-substantive changes. decision is now affirmed.

> This case was of course presented before me upon the petition for assessment of civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977 for one violation of the regulatory standard at 30 CFR Section 75.201. The general issue is whether the Rushton Mining Company, which I will refer to as Rushton, has violated the cited regulatory standard and, if so, what is the appropriate penalty to be assessed.
>
> The order before me (No. 1150256) was issued pursuant to Section 104(d)(2) of the Act by MSHA Inspector Donald Klemick on May 7, 1982, and reads as follows:
>
> "The method of mining that was followed in the F-butt 008 section during the 12:00 to 8:00

was subsequently modified. As finally agreed to by the parties, the modification to the order added that the method of mining also violated the roof control plan drawing 7(a).

The standard cited, 30 CFR § 75.201, reads as follows: "The method of mining followed in any coal mine shall not expose the miner to unusual dangers from roof falls caused by excessive widths of rooms and entries or faulty pillar recovery methods."

Now, the determinative issue in this case, as both parties have stipulated in essence, is whether, in taking the right side final pushout of the cited stump, the continuous miner operator placed himself under unsupported roof. If the continuous miner operator did indeed place himself under unsupported roof, it is conceded that the operator would have been exposed to unusual dangers from a potential roof fall in violation of the cited standard. On the other hand, if he did not proceed beyond unsupported roof, then it is recognized and conceded that there was no violation.

In this regard, there is evidence on the one hand from the government through the testimony of MSHA Inspector Klemick, based on his observations of the number of support posts placed adjacent to the pushout area and an estimate of the distance between these posts, that the final pushout was cut to a depth of some 24 to 30 feet. I observe at this point that this estimate was itself given with a six foot margin of error, thereby in itself raising some question as to its accuracy.

Since it is undisputed that the miner operator would have been under unsupported roof because of his position on the machine if he cut to a depth of 15 feet or more, according to the testimony of Inspector Klemick the miner operator would have been some 11 to 15 feet beyond supported roof.

of a representative of the mine operator, and that under those circumstances there can be little dispute over the distance. You have then an objective basis on which you can establish the distance. As I say, this procedure was not followed in this case.

Moreover, according to Mark Naylor, the representative of the mine operator who accompanied Inspector Klemick, he told Inspector Klemick that he thought the cut was only 13 to 14 feet deep. While Mr. Klemick apparently disagreed with this estimate, stating something to the effect that he felt the cut was deeper than that, I note that even then, in spite of the knowledge at that point that his estimate was being questioned and would indeed undoubtedly be questioned and challenged at future proceedings, the inspector nevertheless did not even at that point take a more precise measurement or receive some sort of concurrence as to the depth of the cut from the representative of the operator.

I must point out also that the government's evidence is also tempered by the testimony of the operator's witnesses - miners who were present when the cut was taken - namely, roof bolter Lemuel Hollen; the continuous miner operator, Donald Baker; and the section foreman, Ed Snyder. In addition, there was the testimony of Mr. Naylor, who accompanied Klemick during his inspection. All of these witnesses confirmed that the cut in the final pushout on the right side of this stump did not place the continuous miner operator under unsupported roof.

I find with respect to the operator's witnesses, that the testimony of Don Baker, the continuous miner operator, is particularly significant.

served serious roof problems further up. Mr. Baker was, as he testified, also quite aware at that time of other roof falls that had occurred in this mine in which continuous miners had been buried. He was, in fact, in my opinion freshly aware of his mortality at that time and, under the circumstances, would certainly be the last person to work under unsupported roof. I therefore give his testimony that he was not working under unsupported roof special credence.

Under the circumstances, I am compelled to find that the government has just not been able to sustain its burden of proof of the violation. By so finding, this does not mean that I do not believe in the veracity of the government's testimony. Nothing could be further from the truth. I am convinced that the inspector testified truthfully to the best of his ability. I am absolutely convinced of that. I am just compelled to find, for the reasons stated, that I am not convinced that his observations have been sufficiently corroborated by any objective measure and particularly in light of the opposing credible testimony, I just cannot sustain the government's case. I cannot find based on the credible evidence that the continuous miner operator had cut the final pushout to a depth that would have exposed him to unsupported roof.

Accordingly, I find that the violation has not been committed. The order is therefore vacated, and this case is dismissed.

Assistant Chief Administrative Law Ju

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/nw

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of GERALD D. BOONE, Complainants	:	DISCRIMINATION PROCEEDI
v.	:	Docket No. WEVA 80-532
REBEL COAL COMPANY, Respondent	:	HOPE CD 80-67

ORDER OF DISMISSAL

Appearances: Edward H. Fitch, Esq., and Robert A. Cohen Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainants;
Douglas D. Wilson, Esq., Gardner, Moss, Brown & Rocovich, Roanoke, Virginia, for Respondent.

Before: Judge Melick

The Complainant on behalf of Gerald Boone requests approval to withdraw the Complaint in the captioned case acknowledging receipt in full of the monetary damages, costs, and attorney's fees ordered by the undersigned to be paid. Under the circumstances herein, permission to withdraw is granted. 29 CFR § 2700.11. The case is therefore dismissed.

Gary Melick
Assistant Chief Administrative

Distribution:

Robert A. Cohen, Esq. and Edward H. Fitch, Es
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vard, Arlington, VA 22203 (Certified Mail)

Mr. Gerald Boone, Robertson Subdivision, Pric

JACK E. GRAVELY, JR., Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 83-101-D
v.	:	
	:	HOPE CD 82-52
RANGER FUEL CORPORATION, Respondent	:	Beckley No. 2 Mine

DECISION

Appearances: Belinda S. Morton, Esq., Fayetteville, West Virginia, for Complainant; W. H. File, Jr. and John L. File, Esqs., File, Payne, Scherer & Brown, Beckley, West Virginia; Fletcher A. Cooke, Esq., Leband Virginia, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a complaint of alleged discrim tion filed by the complainant against the respondent pursuan to Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The complaint was initially filed pro se by the complainant after he was advised by the Secretary of Labor, MSHA, that an investigation of his com- plaint determined that a violation of Section 105(c) had not occurred. The complainant then retained counsel to pursue his case before this Commission.

The respondent filed an answer denying the allegations of discrimination, and pursuant to notice a hearing was conducted at Beckley, West Virginia, on October 4, 1983, and the parties appeared and participated fully therein. Th were given an opportunity to file post-hearing proposed findings and conclusions, with supporting briefs, and the arguments presented therein have been reviewed and considere by me in the course of this decision.

Issue

The issue in this case is whether or not Mr. Gravely's

work crew. Respondent contends that this failure on Mr. Gravely's part resulted in damage to two pumps, and that Mr. Gravely's work performance as a foreman was less than adequate.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 CFR 2700.1, et seq.

Testimony and evidence adduced by the Complainant

Ralph D. Carr, shuttle car operator, testified that on or about July 27, 1982, he was working on Mr. Gravely's crew and he was instructed to operate a uni-track machine hauling crib blocks and headers to be used in supporting the top. During the operation of this machine he ran over a pump which was placed in the roadway, and he did so after believing that the person assigned to watch it and move it had done so. Mr. Carr believed that mine foreman Dennis Mye had assigned the person to watch the pump (Tr. 11-15).

Mr. Carr confirmed that a danger board was posted on the section in July 1982, and it was located approximately "one break back from where the top worked" (Tr. 14). Work to support the top was started at the location of the danger board and Mr. Gravely instructed him to start work at the danger board and that is what he did. Mr. Carr stated that Mr. Myers wanted the crew to go further into the dangered area, but he did not do so because it was against the law to go beyond the danger board (Tr. 15).

In response to questions from the bench, Mr. Carr stated that Mr. Gravely was a foreman in charge of his crew and that Mr. Myers was the night shift foreman and was Mr. Gravely's supervisor (Tr. 16).

On cross-examination, Mr. Carr stated that startin work at the danger board and working toward the face su the roof as they progressed was the normal and proper p (Tr. 24). He explained the circumstances surrounding h running over the pump (Tr. 27-30).

Bernard R. Campbell, Jr., testified that he works the mine "hoot owl" shift, and that he knew Mr. Gravely when he worked as a foreman. Mr. Campbell stated that was on Mr. Gravely's shift in July 1982, working at the posted danger board area installing roof supports at th track entry. Mr. Gravely was supervising the work. The work began at the danger board and progressed inby, and one "coaxed" him to go any further than where they were actually working (Tr. 34).

Mr. Campbell stated that during the time he worked Mr. Gravely he never asked him to do anything which wou violate the law. Mr. Campbell stated that while there wa no roof fall at the danger board area, the area at the cut inby that area "fell some" (Tr. 35).

In response to bench questions, Mr. Campbell state that there was no violation at the danger board area be the roof was permanently supported there. No MSHA insp were present on the evening in question, and as far as knows the company was not cited for any loose roof viol (Tr. 37).

Mr. Campbell stated that he is a UMWA safety commi was aware of the danger board situation, and that no on complained about the roof being loose, when asked if he what this case was about, he responded as follows (Tr.

> JUDGE KOUTRAS: Do you know what this case is all about?
>
> THE WITNESS: Not exactly.
>
> JUDGE KOUTRAS: Do you know what Mr. Gravely is complaining about?

JUDGE KOUTRAS: He claims -- at least part of his claim here is that he was required to take -- that part of the reason for discharge was that he refused to take his crew into an area that he thought was unsafe.

Do you have anything to contribute to that allegation, based on your own personal knowledge

THE WITNESS: Well, if Mr. Gravely says that we have to go in here to save this place, if I hadn't of been there the employees still didn't have to go in by it, they could ask for a committeeman, then they would have had to have got a hold of me and the mine foreman. But still, for a bad top, it's common knowledge to try to save it if you can.

Mr. Campbell stated that when work started at the dan board Mr. Gravely had the responsibility to make sure the area was safe to start work and he made the decision that work was completed the first night, and he returned to the area on the next working shift and continued installing ro supports (Tr. 41). Mr. Gravely never indicated that he di not want to go beyond the danger board (Tr. 43).

Jim L. Ellis, currently employed by Phillips Coal Com testified that he was employed by the respondent from Dece until November 1982, as a foreman. He worked with Mr. Gra over a period of a year and a half, but on different shift (Tr. 45-46).

Mr. Ellis stated that it was company policy to post a list of persons assigned to work weekends. He recalled a shift during the Memorial Day weekend in 1982, and that Mr. Gravely's name was not posted. Mr. Ellis worked that weekend as a fire-boss (Tr. 47-48).

Mr. Ellis confirmed that a member of his crew destroy a pump approximately a year and half ago during the summer of 1982. He also confirmed that the shuttle car operator who ran over it was not disciplined because it was not his fault (Tr. 50). Mr. Ellis also stated that it was his responsibility to watch the pumps, that he assigned no one

he probably worked on Mr. Gravely's shift as he had on several different occasions (Tr. 57). He recalled posted danger board and indicated that he and his roo helper were assigned there to bolt the top. The roof working too bad" and no bolting took place until the cleaned up (Tr. 58). He considered Mr. Gravely to be foreman (Tr. 59).

When asked about the danger board incident, Mr. responded as follows (Tr. 62):

> JUDGE KOUTRAS: At any time during this entire episode, this one or two nights now that this incident took place about the hea and the danger board and all that business, did anyone ever instruct you specifically t go beyond the danger board to expose yourse to any hazard or anything?
>
> THE WITNESS: No.
>
> JUDGE KOUTRAS: Mr. Gravely or anybody else
>
> THE WITNESS: No.
>
> JUDGE KOUTRAS: Do you know whether Mr. Gra asked any of his crew to do that?
>
> THE WITNESS: Not that I recall.
>
> JUDGE KOUTRAS: Did Mr. Myers or anyone els from management, to your personal knowledge instruct Mr. Gravely to take his crew beyon the danger board?
>
> THE WITNESS: Not that I can recall. I don remember.

Clifton P. Chandler, testified that he previousl worked for the respondent for 12 years in various for positions but left when the mine shut down in Novembe

in question, if he were notified by a superior to work he would do so (Tr. 68-69).

Gary Lee Kiblinger testified that he has been employed by the respondent for four years as a plow operator. He stated that in July 30, 1982, he was working under Mr. Gravel supervision while operating a continuous miner "scraping bottom." He explained the circumstances under which he ran over and damaged a pump. He was not disciplined by Mr. Grave and he believed the pump could have been avoided if the pump line had been moved (Tr. 160-163).

Mr. Kiblinger confirmed that he worked the "hoot owl" shift on July 27, 1982, and that the work involved pinning and timbering the roof at the area where it had been dangered off with a danger board. He worked again on July 28, but he was not there when the roof actually fell, but he did indicate that at the time he was working to support it "it had bellied, it hadn't lacked much falling. It was belly when we was putting them six by eight headers up" (Tr. 164). He also indicated that the roof condition was bad, and that "It was going to fall, don't matter what they put under it, it was going to fall", and that "when we put the three by eights up it started bowing" (Tr. 165-166).

On cross-examination, Mr. Kiblinger stated that the pump casing was pierced, and that in order to use it again it would have to be repaired. The usual way to repair it is to install a new casing (Tr. 167). He also indicated that pumps have been "burned up" through negligence when they are allowed to "sit there and burn up" (Tr. 167).

Jack E. Gravely, Jr., testified that he is currently employed as a salesman for the 84 Lumber Company, and that he previously worked for the respondent from February 13, 198 to July 30, 1982, as a section and construction foreman. As construction foreman on the midnight shift his job entaile doing "everything," and he worked on different sections with different crews (Tr. 75). His salary during 1982 was approxi $2600 a month (Tr. 98).

to work (Tr. 77). Mr. Gravely explained the procedure for posting the work list, and he indicated that while he was informed that his suspension would be without pay, he was in fact paid for the three days he was suspended (Tr. 78-82).

Mr. Gravely denied that he was ever reprimanded over an incident concerning a continuous miner operator being off center on a 20 foot cut, and that he in fact had reprimar the miner operator over that incident (Tr. 82-82).

With regard to the incident concerning Mr. Carr running over a pump, Mr. Gravely explained the circumstances. He indicated that Mr. Carr was not at fault, and that the person assigned to watch and move the pump was moved to anoth location by Dennis Myers, and since Mr. Myers was his supervisor, Mr. Gravely did not question his decision (Tr. 84-86).

Mr. Gravely stated that on July 27, 1982, his crew was composed of Ralph Carr, Gary Kiblinger, and Kenny Davis. The crew intended to work on scraping the bottom, and after some preparation work he checked the roof and found that "it was working pretty bad." He instructed the crew not to scrape bottom and they began setting timbers. Mr. Myers came to the area, and after looking at the top, ordered some headers, and Mr. Gravely's crew worked the rest of the shift on the top. Mr. Gravely left the danger board for the next shift coming on the section (Tr. 88).

Mr. Gravely stated that he next returned to work on the midnight shift on July 28, 1982, and Mr. Myers was his shift supervisor that night. Assistant shift foreman Larry Burgess informed him that the top on the section was bad and that he had placed the danger board all the way out into the entry and that any roof support work would have to be started at the location where the danger board had been moved. Mr. Grav then proceeded to work his crew for the entire shift, startir at the danger board, and they proceeded inby to secure the roof, but at 5:00 a.m. that morning a roof fall occurred inby the area where they were working (Tr. 90).

it would have been a lot better if I could have started further in, but it would have placed my whole crew and myself in imminent danger had we went any further in. And the next day, Harrison Blankenship told me that I definitely should have went further in there and secured the area that fell.

Q. Did you hear any crackling noise from the top?

A. Oh, you can always hear the top breaking up if it's bad. You see it dripping.

Q. Had you had any run-ins before with Mr. Blankenship or Mr. Burgess as to the techniques that you used with your men?

A. No, ma'am.

When asked why the respondent terminated him, Mr. Gravely responded as follows (Tr. 91-92):

Q. So why do you believe that Ranger Fuel terminated you?

A. They told me -- on Friday the 30th, I worked that same section. There was another roof fall that wouldn't have been classified as a legal roof fall by MSHA regulations because it wasn't bolted yet. Larry Burgess again told me that he had been on that section, that they had cut a break-through through from both sides and the top was too bad -- they bolted it on one side and they cut it on the other side without it being bolted, and then give me two men, Eric Coleman and Dennis Cello to bolt it and three men to scrape bottom. I called Dennis Myers, and he come and looked at it and decided that he wanted to take the miner in and clean the rock up. So he called and got more people and got

they were thinking about firing me over allowin
the first roof fall.

And, at Tr. 99:

> Q. Are you sure that's the only reason that Ranger Fuel discharged you was because of the danger board incident?
>
> A. Yes, ma'am.
>
> Q. He specifically said that when he discharge you?
>
> A. Harrison Blankenship, yes, ma'am, he told m specifically that I should have gotten that top secured. And Dennis Myers had already told me before that, that they were thinking about firi me over that fall.

Mr. Gravely testified as to the circumstances surrou a second pump which was damaged at the same water hole wh the first pump had been destroyed. Miner operator Gary K caught the pump hose with his miner while it was laying b the rib after being disconnected by electrician Randy Joh The pump was dragged some 75 to 100 feet, and Mr. Gravely believed that only the "goose neck" used to hook on the discharge hose was damaged and that this piece cost eight ten dollars. Mr. Kiblinger was not reprimanded and the electrician was under the supervision of maintenance fore Floyd Holthouser (Tr. 95-97).

Mr. Gravely stated that the value of the second pump was probably two or three thousand dollars, and he denied that he had ever previously been blamed for destroying material on his shift (Tr. 98).

Mr. Gravely confirmed that he was not given a writte letter of discharge. He was advised orally by Mr. Blanke and mine manager Walt Crickmer that he was discharged (Tr. 100).

discharged over the roof fall, and on the 30th there was the second roof fall" (Tr. 101).

Mr. Gravely denied that Mr. Blankenship ever advised him that he would be suspended on March 16, 17, or 18, 198 because cribs had to be installed on the No. 3 entry when the ribs were cut off center. He also denied that he was in fact suspended on those days (Tr. 103-104).

Mr. Gravely identified exhibit R-2 as a report he prepared and filed with his superior as part of his duties as a foreman. The report reflects that miner operator Rick Stewart cut certain areas too wide on March 3, 5, and 12, 1982, and that Mr. Gravely verbally warned Mr. Stewart about the incidents (Tr. 109-112). Mr. Gravely denied tha Mr. Blankenship reprimanded him on March 12, 1982, nor did he suspend him (Tr. 113).

Mr. Gravely identified exhibit R-3 as a mine map, and that the No. 2 entry is the intake air entry, a track entr and a belt entry. He confirmed that this is the entry whe the pump incidents occurred and where the danger board in question was placed (Tr. 115-117). He denied that the pri roof fall occurred in the No. 1 entry, and stated that it occurred in the break-through between the No. 1 and 2 entr and that it actually blocked the break-through and not the entry. He indicated that the fall was some 30 feet from t No. 2 entry and that it was not possible to approach that area from another direction other than going by the danger board on No. 2. He also indicated that the area could not be approached by going in the No. 1 entry outby the danger board because the area was solidly cribbed off (Tr. 121).

Referring to the mine map, Mr. Gravely contended that the area where he was criticized for not going with his crew was "inby that danger board and to the left in the break" (Tr. 122). Mr. Gravely stated that at no time did he refu to go into an area because it was beyond the danger board, further testified as follows (Tr. 123-124):

> Q. And did anyone direct you to go into an area beyond the danger board?

A. I had better sense than to take my men into an area like that; and, because I didn't take them in there, they didn't have to refuse.

Q. So you didn't refuse to go and the men didn't refuse to go. Is that correct?

A. We didn't go. My men, nor myself went into that area.

Q. And the fall that later occurred, and it was a rather large fall, was over at the break-through near or in the No. 1 entry. Is that not correct?

A. It was in the break-through, yes.

Q. But no one ever specifically -- did anyone ever specifically tell you to go to correct that?

A. Specifically tell me to correct that; yes, si

Q. Who did that?

A. Dennis Myers and Larry Burgess.

Q. And why did you not do it?

A. I started where they told me to start.

Regarding his conversations with Mr. Myers and Mr. Blaship over the pumps, Mr. Gravely testified as follows (Tr. 125):

Q. Now, when you were called in after the second event relating to the pump, who was present at that time?

A. After the second one?

Q. Yes.

A. That was later, that wasn't at the time that I was called in.

Q. And what did Walter Crickmer state to you?

A. Walt just told me that I was being discharged. Harrison Blankenship had already talked to me, all I was seeing Walt for was to turn my equipment in.

Q. What did Mr. Blankenship say to you in particular as to why you were being discharged?

A. For not getting in that area and timbering that fall.

Q. Did he say anything else to you about the pumps?

A. No, sir, not to my knowledge.

Q. Now, he talked to you. Would it have been to your knowledge?

A. Well, that's a year and a half ago and I don't remember word for word his specific conversation.

Q. You're not prepared to state under oath that he did not tell you that you were being fired because of the pumps, are you?

A. I'm not prepared to say under oath that he did or didn't. I'm saying under oath that it was a year and a half ago and I don't remember word for word what he said.

And, at Tr. 126:

Q. Mr. Gravely, then you do not deny that you were told -- since you cannot recall, you do not

Q. You deny it?

A. Yes, sir.

Q. Well, a minute ago you said you couldn't remember.

A. I couldn't remember his exact words, but I can remember that I wasn't told all of that

Mr. Gravely stated that he was never told to go in an unsafe area, and that therefore, he did not refuse t go into an unsafe area (Tr. 128). He confirmed that a board is moved as the work progresses inby to support t roof, and that he would always be working in the vicini of the danger board as it is moved inby with the roof s work (Tr. 129).

Mr. Gravely denied that Mr. Blankenship, Mr. Burge or Mr. Crickmer ever specifically counseled him about h work or the way he was carrying out his duties (Tr. 129

When asked about the roof fall that Mr. Gravely co caused his discharge, he stated as follows (Tr. 147-152

JUDGE KOUTRAS: Mr. Gravely, in your earlier statement that you filed, the written statement, you say that Mr. Myers had told you that Mr. Blankenship had said that they were going to fire you for the fall that occurred on the 28th.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And then your statement says that Mr. Blankenship told you that he was firing you because of the fall that occurred on the 28th.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: Did he blame you for the fall that occurred on the 30th, too?

* * * *

JUDGE KOUTRAS: What was your response to him when he allegedly told you that's why they were firing you?

THE WITNESS: I told him that the top was too bad, that we started where I had been instructed to start.

* * * *

JUDGE KOUTRAS: Did you tell Mr. Crickmer that Mr. Blankenship fired you because he wanted you to go into an area that you thought was unsafe?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And what was his response?

THE WITNESS: His response was that there was nothing wrong and that I had destroyed the pump.

And, at Tr. 153-155:

JUDGE KOUTRAS: Okay. So the nuts and bolts of your complaint is your contention that the company fired you for failing to take care of a roof fall to the satisfaction of your supervisor or your superior?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And your response to that is that you weren't responsible for the roof fall and that you weren't about to go into an unsecured area with your crew and do some work?

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: But nobody from the company, none of your superiors or anybody ever suggested to you directly that you do that. Is that right?

fall conditions starting at the danger
all that, did anybody suggest to you spe
how you were to go about your duties of
the roof fall?

THE WITNESS: Well by the time anybody c
check on me -- which would have been Mr.
I was already doing it.

JUDGE KOUTRAS: But nobody from manageme
of your superiors, suggested to you that
to take your crew in by a danger board?

THE WITNESS: Well, Dennis said it would
better if I would have got started furth
which would have been in by the --

JUDGE KOUTRAS: When was this though?

THE WITNESS: That would have been durir
shift, probably two or three o'clock in

JUDGE KOUTRAS: And you told Dennis -- w
you say to him?

THE WITNESS: I started where Larry Burg
told me. Larry Burgess was the man who
dangered the area off initially.

JUDGE KOUTRAS: But no one said anything
at that point, Mr. Myers or no one else
anything to you other than maybe you sho
started in a little further?

THE WITNESS: No, not at that point.

Testimony and Evidence Adduced by the Respondent

Walter B. Crickmer, III, testified that he is
geologist and has worked for the Pittston Company
years. At the time of Mr. Gravely's discharge he
mine manager at Ranger Fuel Company's Beckley No.
He stated that prior to Mr. Gravely's discharge, h
his work performance with him. He described the r
these discussions as follows (Tr. 178-179).

job to reorganize the mine and get the mines back on the right track. We discussed all the foremen at different times.

We had Harrison, and Jack worked for him on production. He had a problem with keeping Jack's crew on-center. I'm not saying that that was the only problem with Jack. We had Jack -- we moved him from production to construction, construction to general work all over the mine, on every shift, on every production shift, you know, day, evening and owl, trying to find a place for Jack to work. We had problems in each category.

It kept going right along, and all of a sudden I started noticing, one of the miner foremen mentioned something to me that well, maybe Jim Campbell, one of the general work superintendents, said we have a problem with absenteeism with Jack. We looked at this record and started to see that every Friday and every Monday he was off; every Friday and every Monday he was off -- I mean not every one but a tremendous majority, 30 or 32 days or something within a year's period. He was always off Mondays and Fridays.

And we kept moving him from shift to shift and from one section of the mine from construction to production and these pump episodes came up and, you know, I've been through this with the Unemployment Commission and MSHA and all this before and there wasn't ever any question of Jack's discharge ever being involved with this roof problem.

When Harrison approached me that morning after he had talked with Dennis about a second pump being destroyed -- it wasn't destroyed, we repaired it for $800 -- he approached me with the thought that: okay, we have another pump

Mr. Crickmer identified exhibit C-1 as Mr. Gravely's "discharge paper", and he confirmed the "W.C." shown at the bottom of the document are his initials evidencing the fact he approved the discharge (Tr. 180).

Mr. Crickmer stated that in 1982 it was possible for a foreman to be paid when in fact he had not reported to work. He explained that this was possible because of poor management and record keeping and that foremen were permitted to turn in their own time sheets. Since that time, company policy brought about changes and improvements (Tr. 182). Mr. Crickmer stated that Mr. Gravely was paid for three days on June 2, 3, and 4, 1982, because he turned in his own time. Mr. Crickmer stated that he was aware that Mr. Gravely had been suspended on those days, but he didn't know that he had been paid "until all these things started taking place" (Tr. 183).

Mr. Crickmer stated that while Mr. Gravely's discharge paper lists only the pump as the reason for his discharge, every other reason is not always listed (Tr. 181).

On cross-examination, Mr. Crickmer confirmed that his present employer is Clinchfield Coal Company, and that Ranger Fuel and Clinchfield are divisions of the Pittston Company Coal Group. Mr. Crickmer confirmed that he appeared and testified at a hearing before the West Virginia Department of Employment Security on September 23, 1982 (Tr. 185).

Mr. Crickmer stated that Mr. Gravely's alleged absenteeism was not a factor in the decision to discharge him, and he explained his answer as follows (Tr. 188):

> A. No, not a factor of his discharge. His discharge was brought about by his inability to control his crew; his inability to perform under each one of the superintendents; his constant moving from one job area to another; my discussions with Jack personally on these problems that he was having with staying on-centers;

can't discharge a person because of that, ma'am.

Mr. Crickmer testified as to the value of the two pump which were "destroyed," and he stated that the first pump was "completely destroyed" and that the second one was "dam severely." He could not state the precise costs for the pu (Tr. 198-201).

Mr. Crickmer stated that Mr. Blankenship suspended Mr. Gravely on March 16 and 17, 1982, for "being off-center controlling his crew," but he did not know whether it was written or verbal (Tr. 201-202).

Mr. Crickmer identified exhibit R-4 as a copy of an invoice from the respondent's records indicating that the cost to repair the second pump in question was $854 (Tr. 20 He also identified exhibit R-5 as copies of Mr. Gravely's attendance record for the period February to December 1981, and January to July 1982 (Tr. 208).

After referring to Mr. Gravely's attendance records, Mr. Crickmer stated that they reflect that he worked on March 17 and 18, 1982, but missed March 16 (Tr. 218). Respondent's counsel conceded that Mr. Crickmer had no personal knowledge as to whether Mr. Gravely was actually suspended on March 16 and 17, 1982 (Tr. 224-225). Under the circumstances, the payroll records, exhibits R-5 and R- were rejected and not admitted (Tr. 226).

With regard to Mr. Gravely's alleged failure to work over the Memorial Day weekend, Mr. Crickmer conceded that his name was not posted on a work list but that he was personally informed verbally by his immediate supervisor th he had to work (Tr. 229-230).

In response to bench questions, Mr. Crickmer stated that aside from the matter of Mr. Gravely not working on the Memorial Day weekend, none of the other asserted disciplinary actions, counseling, warnings, etc., were ever reduced to writing (Tr. 235).

On cross-examination, Mr. Smith stated that whil did not hear Mr. Burgess tell Mr. Gravely that he had he did see Mr. Gravely's name "on the board where Lar marked his out and put Jack's" (Tr. 262). The board the foremen's office where a foreman would normally g make notations in the books (Tr. 263). Mr. Smith did know whether Mr. Gravely ever saw the list when it wa on Wednesday (Tr. 267).

Larry Burgess, assistant shift foreman, second s testified that he was so employed in 1982. He stated he scheduled Mr. Gravely to work the Memorial Day wee by crossing out his own name from the posted list and Mr. Gravely's. He did so after clearing it through m foreman Bill Ward and Mr. Blankenship, and he stated he told Mr. Gravely about the change (Tr. 271-272). was made on a Wednesday, and Mr. Gravely informed him "hell, no, I ain't going to work" (Tr. 274).

When asked to evaluate Mr. Gravely's work perfor Mr. Burgess responded as follows (Tr. 274-276):

> Q. Well, in the time that he worked for you prior to May and up until the time he was discharged, did you have any opinion about the type of work he was doing and whe or not --
>
> A. Yes, sir, I did.
>
> Q. -- it was satisfactory work?
>
> A. It was very unsatisfactory. Jack resented me for some reason or another, and it was my section to look after and I would make checks of it and I'd give him my opini of what needed to be done and what I wanted him to do and so forth.
>
> Q. And what reaction did you get to that?

I come on the section and everybody would be in the dinner hole.

Q. Had you ever recommended that he be terminate prior to the time he was?

A. Yes, sir. I had been in trouble over Jack several times through my superiors for center lines, how critical it would have to be for the belt going through. Mr. Campbell, which is over construction, he was over the belt lines and all, he called me into his office several times over it; and, Harrison, we had discussed Jack several times. I couldn't do a thing with him.

Q. Is it true from what you say that the center lines are very important in driving the --

A. Yes, sir.

Q. And that if they're off three to six feet, does that create a problem?

A. It sure does if it's in your belting, absolut

Q. So you would have to come back and straighter it out. Is that right?

A. Yes, sir. What time that you have to back up to shear your ribs, that's time that you're losir in production in the face. You know, you could be getting a cut of coal for what time you was getting two or three buggies to straighten up the miss and taking it back to the face up here and bolting the ribs, and it's a lot of time and a lot of loss in production.

Q. Is there also a lot of risk of violations of regulations?

A. Well, sure. It's a state law that all places must have a center line in before the cut. Sever

On cross-examination, Mr. Burgess stated that no violations were ever issued against the respondent for the places in question too wide (Tr. 276). He also st that while he could have disciplined Mr. Gravely for n working over the weekend in question, he did not do so turned the matter over to Mr. Ward and Mr. Blankenship (Tr. 282).

When asked about the events of July 27 through 30 and the roof fall, Mr. Burgess testified as follows (T 285, 286, 288):

> JUDGE KOUTRAS: Are you aware of the events of July 27th, 28th, 29th, and 30th, this roof fall business and all that?
>
> THE WITNESS: Yes, sir, I was.
>
> JUDGE KOUTRAS: Tell me in your own words what you know about that.
>
> THE WITNESS: Well, it's my opinion if it wa taken care of the way it should have been to start with we wouldn't have had all the prob that we had.
>
> JUDGE KOUTRAS: That's a little too broad an too general.
>
> THE WITNESS: No. Seriously, if the interse where the top had give way had been supporte like it was supposed to have been to start w the top wouldn't have took off. I mean it has to break out somewhere.
>
> * * * *
>
> JUDGE KOUTRAS: All right. But on the 27th, you agree that they were sent down to do som scraping and that they encountered a bad top

THE WITNESS: Harrison explained to me what he wanted done up there, and I had the map. All right. When I come out that evening I told Jack, I said: Jack, I've got a map here -- he said I've got one, too. And I said, well, let me show you what Harrison wants, and he said: I know what he wants.

* * * *

THE WITNESS: No, sir. I showed him the map of --

JUDGE KOUTRAS: Of what he was expected to do?

THE WITNESS: That's right.

JUDGE KOUTRAS: At what area?

THE WITNESS: In No. 1 intersection.

JUDGE KOUTRAS: In No. 1 intersection?

THE WITNESS: That's right.

JUDGE KOUTRAS: And his response to you was?

THE WITNESS: He knowed what to do.

JUDGE KOUTRAS: Did he take the map from you?

THE WITNESS: No, he had his own map.

Harrison L. Blankenship, Jr., assistant mine foreman, stified that in 1982 he was the mine production superintende d that he has 12-1/2 years of mining experience. Mr. Blanke ip stated that he first became aware of a problem in the . 1 and No. 2 entry area on the morning of July 26, 1982, en either Mr. Gravely or an electrician reported a bad p in the No. 1 entry and asked him to look at it. . Blankenship went to the area, which he described as e last open cross-cut in the No. 1 face between the No. 1 d No. 2 entries (Tr. 298). The entry itself is used for r return.

(Tr. 301-303).

Mr. Blankenship stated that when he returned to the area the next morning, July 27, he found that the cribs had been installed improperly and contrary to his instructions. He examined the roof, and while it did not look any worse he decided to let Mr. Gravely's "hoot owl" shift install additional cribs in the way he had explained the day before He personally drew a diagram on a yellow pad and told him how he wanted the roof cribs installed. At that time no danger board had been put up, and he does not know when the board was put up or who put it up. He was aware of a dange board in the No. 2 entry approximately 130 to 140 feet out by the bad top area (Tr. 306).

Mr. Blankenship stated that when Mr. Gravely went to the area which he sketched out for him, he found a danger board and started his work at that point. Mr. Blankenship believed the danger board "was put or set much too far out by the bad top," and six hours after his shift the top in the No. 1 entry intersection fell in, and it sheared off at the extension over the area where the cribs had been instal Mr. Blankenship stated that there was no doubt that the fal would not have occurred if his initial orders to install "turn cribs" had been followed (Tr. 308).

Mr. Blankenship stated that at the time the roof condition initially developed it was possible to approach the intersection from two directions. He stated that six cribs were set in the No. 1 entry along the left rib, but there was still room to take a piece of equipment up to the entry. There was no danger board at the approach to the No. 1 entry, and the only danger board was set at the No. 2 entry (Tr. 309).

When asked whether it would have been unsafe for Mr. Gravely and his crew to have done anything that he eith ordered or asked him to do in regard to the roof situation, Mr. Blankenship responded as follows (Tr. 309-310):

question truthfully I can't.

Q. Well, I think what you're talking about is on the 28th.

A. Yes, sir.

Q. Now, on the 27th, was there anything that you asked him to do or which your plan required which would have been in your opinion unsafe for them to have done at that time?

A. No, sir. There was no danger board; the top hadn't started to fall. They took the unitrack and hauled cribs all the way through this work site, but just set them improperly.

Mr. Blankenship identified exhibits R-8 through R-12 records which he maintained on Mr. Gravely, and they clude references to an incident on March 12, 1982, his spension of March 16 and 17, 1982, his failure to work on y 29, 1982, his suspension of June 2-4, 1982 for his ilure to work, the pump incidents of July 27 and 30, 1982 r. 310-318).

Mr. Blankenship reviewed the actions shown on the ecords in question and stated that he personally informed . Gravely of the first suspension, that he approved of e second one and that Mr. Ward informed Mr. Gravely of is. Mr. Blankenship also stated that he personally scussed the pumps with him (Tr. 314, 318).

With regard to Mr. Gravely's failure to timber the fall ea as instructed, Mr. Blankenship stated as follows r. 316-317):

Q. Now, you did not take any action or give any reprimand or discipline as a result of this event that took place, did you?

A. No, sir. I did talk to Mr. Gravely about this. I explained to him that there was a time

that it wouldn't be on the ground.

Q. But you did not take any disciplinary act did you?

A. No, sir.

With regard to the second pump incident, Mr. Blank stated (Tr. 317-319):

Q. On July the 30th, which is two days later of course, you state that the same or a simil occurrence with regard to the loss of a pump took place. Is that not correct?

A. Yes, sir.

Q. Was this pump located at the same spad nu as the one before?

A. Yes, sir.

Q. 1944. And that's the same sump area that served the same pump. Is that correct?

A. Yes, sir.

Q. And you state here: "When I asked Mr. Gr about this, he said he had no explanation." that take place?

A. Yes, sir.

Q. And then, did you tell him that you had n choice but to relieve him from his duty becau of negligence?

A. Yes, sir.

Q. Now, what did you do after that in carry out your statement as to what you should do?

Q. And who was your superior?

A. Walter Crickmer.

Q. Did you at the time you terminated Mr. Gra
prepare a personnel termination form?

A. Yes, sir, I did.

Q. I hand you what purports to be such a form
dated July the 30th. Is that filled out by yo

(Witness examines the above-referred to docume

(Pause in proceedings.)

A. Yes, sir, it is.

Q. And did you give Mr. Gravely a copy of tha

A. Yes, sir, I did.

Q. And I believe you said you did that after
to Mr. Crickmer?

A. Yes, sir.

With regard to the discharge, Mr. Blankenship state
as follows (Tr. 324):

Q. Do you remember the gist of the discussion
you had with him about the reasons for dischar
him?

A. Yes, sir. We talked about it several minu
and we decided -- and we even talked with Jack
our presence -- that the reason that he was be
discharged wasn't because of the top falling i
and not going in by the danger board, but just
multiple events that led up to the discharge.

opinions on that?

A. Yes, sir. And on occasion I have even gone out on an out-shift and worked with them on a top that they were afraid of.

Mr. Blankenship could not recall asking Mr. Gravely to the termination form in question. Mr. Gravely, Mr. Ward, and Mr. Myers were all present at the time the form was completed, and Mr. Ward completed part of the form from information from Mr. Gravely's personnel files. The form was presented to Mr. Gravely with an explanation as to why he was being discharged (Tr. 327-330).

With regard to Mr. Gravely's suspension on March 16 and 17, 1982, Mr. Blankenship stated that if Mr. Gravely in fact worked on those days "it was an oversight on somebody's part." He explained that 60 or 65 foremen are at the mine and it is difficult to keep up with all of them (Tr. 343).

Mr. Blankenship stated at least four or five other fore have been suspended, fired, or asked to resign for offenses similar to those engaged in by Mr. Gravely, and that Mr. Gra has not been treated in any harsher manner. Some of these actions against foremen were before and after Mr. Gravely's discharge. Mr. Blankenship named at least four foremen who were suspended. One was suspended for five days for a first offense for "getting off centers" (Tr. 369). He also indicated that three of the foremen opted to quit rather tha being fired (Tr. 370).

Mr. Kiblinger and Mr. Carr were recalled in rebuttal by Mr. Gravely's counsel. They testified further with respect to the roof control cribs which were set at the break betwee the No. 1 and No. 2 entries, as well as the danger boards mentioned in this case.

Mr. Gravely was recalled by me, and except for his suspension for three days in June 1982, which he readily acknowledged, he denied that he had otherwise been disciplin suspended, or counseled about his work (Tr. 383). Mr. Grave reiterated his belief that when Mr. Blankenship attempted to

held accountable and to blame for a roof fall which occurred on the section where his crew had engaged in some roof suppor work. Mr. Gravely asserted that assistant mine foreman Harrison Blankenship expected him to take his work crew inby an area which had been "dangered off" by the posting of a dan board sign to perform certain work to support the roof.

The respondent's defense in this case is based on its assertion that Mr. Gravely was discharged from his management position as a foreman because of an accumulation of prior incidents and conduct which occurred during his employment tenure. These incidents and allegations by the respondent with regard to Mr. Gravely's work performance include the following:

1. Lack of proper supervision by Mr. Gravely over his work crew which resulted in the destruction or damage to two sump pumps.

2. Lack of proper supervision by Mr. Gravely over his work crew which resulted in the continuous miner operator making certain coal cuts "off center."

3. Excessive absences during weekends, and the failure by Mr. Gravely to report for work on a weekend when he was previously scheduled to work.

In support of its allegations concerning Mr. Gravely's work performance, the respondent presented testimony by forme mine manager Walter Crickmer, assistant shift foreman Larry B and assistant mine foreman Harrison Blankenship.

Mr. Crickmer testified that prior to the discharge, he had discussed Mr. Gravely's work performance with him and that Mr. Gravely had been assigned and reassigned to various foreman positions in an effort to find a place for him to wor but that in each instance management had problems with him. Although conceding that none of the prior warnings or suspens given to Mr. Gravely for his work performance were reduced

Mr. Burgess testified that he considered Mr. Gravely's work performance to be unsatisfactory, and that he had previously made recommendations that Mr. Gravely be termin because of the incidents concerning the "off center" coal Mr. Burgess conceded that he had been in trouble with his superiors over these incidents, and he believed that Mr. G resented him and paid little attention to his instructions

Mr. Blankenship testified as to certain suspensions given to Mr. Gravely prior to his discharge, and he produc his personal records and notes to support these suspensior actions. Mr. Blankenship stated that he personally inform Mr. Gravely of the first suspension, and that he approved second suspension. He also confirmed that he personally discussed the damaged pumps with Mr. Gravely, as well as Mr. Gravely's failure to follow instructions as to how cer roof cribbing should have been installed at the roof fall area.

Mr. Blankenship testified that after the second sump pump was damaged he decided to discharge Mr. Gravely for negligence, and he did so after obtaining Mr. Crickmer's approvel. Mr. Blankenship also testified that he advised Mr. Gravely that he was not being discharged because of the roof fall, but because of "multiple events."

Mr. Gravely took issue with the reported prior discip actions taken against him. In his defense, he testified a to certain mitigating circumstances surrounding the damage pumps, and attempted to establish that even though he was the foreman in charge, the damage to the pumps resulted from actions by other foremen and by the negligence of the individuals who were assigned to watch the pumps.

Although Mr. Gravely denied that he was ever reprimar by Mr. Blankenship or Mr. Myers, he confirmed that he rece a three day suspension for missing a day of work over a Memorial Day weekend. Mr. Gravely insisted that he was no scheduled to work, and even though the suspension was to b without pay, he stated that he was in fact paid for the days he was suspended.

to support inferences that the respondent is somehow attempti to conceal thc real reason for his discharge. While it may be true that the rcspondent's personnel practiccs leavc much to be desircd, particularly with respect to the lack of spcci documentation and lack of record-keeping concerning the prior suspensions and disciplinary actions takcn against Mr. Gravely, I cannot conclude that the respondent has someho fabricated these incidents so as to support the discharge aftcr-the-fact. To the contrary, I find Mr. Crickmer, Mr. Burgcss, and Mr. Blankenship to be credible witncsses, and I find their testimony concerning the prior suspensions, warnings, and counseling with regard to Mr. Gravely's work performance to be believable. Further, absent any showing of a violation of the Act, or a showing that the discharge was motivated by protectcd safety activities, I believc that disciplinary matters between mine management and its manageme staff are best left to those parties for resolution.

I find nothing in thc record here to support a conclusic that Mr. Blankenship or any other member of mine management ever directly or indirectly requested, directed, ordered, or otherwise suggested that Mr. Gravely takc his work crew inby any danger board, or inby any hazardous area of the minc at any time prior to any "work refusal." Although shuttlc car operator Ralph Carr stated that night shift foreman Myers ask the crew to go further into the dangered area, the crew did not proceed any further, and Mr. Carr's assertion is not further supported by any credible testimony or evidence.

Two members of Mr. Gravely's crcw who testified at the hearing in this case did not support Mr. Gravely's assert that the crew was expected to work inby the danger board.

Bernard Campbell worked on Mr. Gravely's shift, and Mr. Campbell is also a member of the UMWA safety committee. He testified that work to support the roof started at the danger board, and that no one "coaxed" him to go any further inby than where the roof was supported. He also testified that Mr. Gravcly said nothing to him about <u>not</u> wanting to go beyond the danger board.

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*/ Submitted post-hearing by Mr. Gravely's counsel by letter and enclosurcs of October 28, 1983. The records are copies

not recall or remember Mr. Gravely, [illegible] manager instruct Mr. Gravely to take his crew beyond the dang board.

Gary Kiblinger, another member of Mr. Gravely's crew, said nothing about anyone ever instructing or ordering the crew to work inby the danger board in question.

Mr. Gravely himself testified that at no time did he take his crew beyond the danger board, and that at no time did anyone ever direct or order him to do so.

I take note of the fact that while Mr. Gravely asserted on the one hand that Mr. Blankenship blamed him for the first fall which occurred on July 28, Mr. Gravely also asserted that Mr. Blankenship never mentioned the subsequent fall whic occurred on July 30, nor did he blame him for it. Mr. Gravel testimony in this regard is rather contradictory, and it occurs to me that if Mr. Blankenship wanted to rely on the roof falls as the basis for Gravely's discharge, he would have blamed both of the falls on him.

Even if I were to accept Mr. Gravely's assertion that the roof fall was the reason for his discharge, there is no evidence to support a conclusion that Mr. Gravely was ordered or requested to do anything which was not safe. Further, there is no evidence that Mr. Gravely's discharge resulted from his refusal to take his crew inby the danger board area in question.

I believe that Mr. Gravely's belief that Mr. Blankenship "expected" him to take his crew inby the danger board stems from the fact that Mr. Gravely believes that he was fired for allowing the roof to fall. In this regard, he apparently relied on a purported statement by Mr. Myers that he should have started the roof support work further in from where he actually did, and Mr. Blankenship's purported statement that he should have started his work further in to secure the roof area that fell. Mr. Gravely also apparently relied on Mr. Myers' purported statement that mine management was think about firing him over an earlier fall. Mr. Myers did not testify in this case, and Mr. Blankenship denied that Mr. Gra discharge was in any way connected with the danger board situ

It seems clear to me from the record in this case that

he was there with me (Tr. 384). Mr. Gravely then stated that he was sure that Mr. Myers did instruct him as to how to crib the area (Tr. 385). Mr. Gravely also acknowledged that he was aware of the method of using roof supports lai out in an "arc," and that there is nothing unusual about this type of roof support. However, in his opinion, even if he had cribbed the roof in this fashion, it would still have fallen (Tr. 401). Given these circumstances, Mr. Gra initial assertions that he had no instructions or knowledg that Mr. Blankenship wanted the roof area which fell cribb in any particular manner are less than candid.

Mr. Blankenship's testimony reflects that his displea over the roof fall stemmed from his belief that Mr. Gravel failed to follow certain instructions which he had given h as to how to support the roof which eventually fell. Mr. testified that he took corrective action to support the ro at the danger board location where Mr. Myers and Mr. Burge instructed him to start. Mr. Burgess testified that when he attempted to discuss the proposed roof support work wit Mr. Gravely, including going over a diagram or a map, Mr. advised him that he knew what Mr. Blankenship wanted done. Mr. Burgess also said that Mr. Gravely had his own map.

After careful review of Mr. Blankenship's testimony, I conclude that his explanation as to how he expected the bad roof area to be corrected is both reasonable and plausible. After viewing Mr. Blankenship on the stand dur the hearing, I find him to be a credible and straightforwa witness. I believe that Mr. Blankenship had given Mr. Grav certain instructions as to how the roof support work shoul have proceeded, but that Mr. Gravely did not follow instru

It seems obvious from the record in this case that th respondent was not too enchanged with Mr. Gravely's work performance as a foreman, and that his discharge came abou after a series of incidents which finally convinced mine management that Mr. Gravely should not continue on as a foreman.

did not discriminated against Mr. Gravely, and that under the Act have not been violated. Accordingly, discrimination complaint IS DISMISSED.

George A. Koutras
Administrative Law Jud

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDIN
	:	Docket No. WEVA 83-93
	:	A.C. No. 46-03887-03505
v.	:	
	:	Mine No. 108
BETHLEHEM MINES CORPORATION, Respondent	:	

DECISION

Appearances: Covette Rooney, Esq., Office of the Solicit U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner; Thomas W. Ehrke, Esq., Bethlehem Mines Corporation, Bethlehem, Pennsylvania, for Respondent.

Before: Judge Kennedy

This matter came on for an evidentiary hearing on the operator's notice of contest of a 104(d)(1) citation and a 104(a) S&S citation issued in connection with a fatal roof fall accident. During the recess between the first and second day of the hearing, the parties negotiated a settlement which, after adducing further evidence, they asked the trial judge to approve.

Because the record disclosed some unusual and troubli aspects of the operator's compliance procedures and MSHA's enforcement procedures, I deem it advisable to set forth t following findings and conclusions as a preamble to confir tion of my bench decision.

Anatomy Of An Institutional Failure

On the afternoon shift of Monday, August 2, 1982, a m roof fall occurred in the No. 3 entry, 1 Left Section of M No. 108. The fall resulted in the death of Louis N. Hodge

who, at the time of the accident, was a temporary entrapment of
miner operator helper 1/ and the temporary entrapment of
William D. Singleton, continuous-miner operator. Mr. Single
was protected by his canopy and extracted himself from the
fall without injury. 2/ Mr. Singleton had 12 years mining
experience of which 7 were as a continuous-miner operator.
The section foreman was Thomas J. Binns. Mr. Binns had
11 years mining experience of which 7-1/2 years were as a
foreman.

The accident occurred while the operator was engaged in a full pillar recovery operation. 3/ More specifically, while Singleton was making his initial or "A" cut of 18' x 10' in the No. 3 Pillar from the No. 3 Entry he noticed a slip crack running diagonally across the roof from the left rib. He ignored or did not appreciate the significance of the condition and when he finished the "A" cut, backed the miner into the entry to position it to make the "B" run and square up the split.

Both Binns and Singleton as well as their superiors were aware of the fact that to make the "B" cut a full 10 feet in width would require the removal of coal from the No. 3 Pillar on a line immediately adjacent to or under a clay vein six inches in width that ran at a right angle across the roof of the No. 3 entry and into the pillar. The clay vein was plainly visible to anyone who looked and had been supported with 2 by 8 headers and bolts since the entry was originally developed in 1975. (See attached sketch.)

1/ Mr. Hodges was a 23 year-old miner with five years under ground experience. This was the second roof fall fatality a the #108 Mine in 1982.

2/ Where continuous-miner operators are protected by canopies, their instructions are to stay in their cabs and to try to tram their machines out from under imminent roof falls. While this may be good for production, it is hard on helpers if the CMO does, as was shown in this case, and cuts down loose roof that triggers a massive roof fall. In the last nine years 435 miners have been killed on the job as a result of roof falls. Thus, on the average 4 miners a month die as the result of roof falls.

3/ Pillar removal is inherently dangerous--perhaps one of

ade no preparations to provide additional roof support.

While Binns and Singleton denied knowledge of the xistence of the clay vein, 4/ Singleton admitted he knew of he crack and counsel for the operator judicially admitted hat "the clay vein just inby the head of the continuous ining machine (as shown in the sketch) was visible to the rew well in advance of the fall." I find that because racks and clay veins are very common in the Rcdstone Coal eam and Mine No. 108, neither Binns nor Singleton considered he crack or the clay vein's presence unusual. 5/ Both men isually observed the roof conditions in the No. 3 Entry and inns may have drummed it once or twice. Neither man drummed ne entry or the split in the area of the crack in the "A" ut before the "B" cut was begun. Both miners knew, of ourse, that cracks and clay veins are signs of an abnormal r dangerous roof condition and that when encountered they hould be carefully evaluated and supported before proceeding o mine coal.

After Singleton loaded two shuttle cars of coal from he "B" run a large piece of draw slate (18" x 6" x 4") fell rom the roof near the rib through which the clay vein ran. t hit the continuous miner and startled Singleton and the ther miners in the area. Singleton stopped the miner and

/ I find Binns position on this incredible. He should ave seen the clay vein during his onshift roof check of the ntry on August 2 and during his preshift examination of the rea on Friday, July 30, 1982, just two days before the ccident occurred. Why Binns chose to absent himself from he face during the time Singleton was making the "B" cut as never explained.

/ Nevertheless every properly trained miner knows that "a lay vein area is very hazardous and must be treated with xtreme caution." Guide to Geologic Features Affecting Coal ine Roof, MSHA Information Report 1101 (1979).

violently. He shouted a warning and ran down the right rib behind the miner and looked at the roof on the left rib. It was creaking, groaning and starting a heavy dribble of rock, slate and clay. He yelled to Hodges and Singleton that the roof was coming down and to get out. Singleton, following his standing instructions, put the miner in reverse and started to back out. Hodges started to run, but stopped to lift the trailing cable from where it had jammed at the corner of the split and was cut down and crushed by a massive fall of rock before he could get to the crosscut.

Lanny Rauer, the mine superintendent, testified he believed both Singleton and Binns acted in accordance with the operator's standing instructions and good mining practic He said Singleton's instructions were to cut down loose roof, wherever encountered, and therefore he could not fault Singleton for proceeding with the "B" run even in the presence of clear evidence of an abnormal roof condition. He also believed Binns adequately checked the roof in the entry before the shift began and while the pillar recovery was in progress. He admitted, however, that his standing instructions on how to handle loose roof in the presence of clay veins might have contributed to the roof fall.

Mr. Crumrine, a roof control expert for MSHA, said Singleton should have backed the miner out of the "B" cut as soon as he saw the rock fall from the area of the clay vein At that point, Binns should have been advised and should have taken action to provide additional roof support as required by safe mining practice, the mandatory standards and the roof control plan. He was, however, sympathetic to Mr. Rauer's claim that Mr. Binns should not be stigmatized with an unwarrantable failure violation and agreed, as conference officer, to change the (d)(1) citation to an (a) citation.

As a result of its investigation, the West Virginia Department of Mines found that all persons should have been withdrawn from the area when the roof was first observed to

The Manager of the Bethlehem Mines Division as well a MSHA's accident investigation found the immediate cause of the roof fall was the undermining of the intersection of t crack running diagonally across the split from the left ri with the clay vein running down the right rib of the split Neither investigation expressed any doubt about the presen and visibility of the clay vein or the crack. The clay ve was six inches in width and the crack at least 1/64th of a inch. Thc area was well illuminated and Singleton saw the crack while making the "A" run.

It was not until Singleton undercut the intersection the crack and the clay vein that the former's significance became apparent to him and by then it was too late. Singl failure to appreciate the significance of the crack can on be attributed to a lack of adequate training in the evalua tion of abnormal roof conditions. Singleton's and Binn's failure to appreciate the significance of the clay vein wa inexcusable. Binn's failure to supervise the operation an to instruct Singleton to shorten his cut in the presence o the clay vein was responsible for the creation of an immin danger. Rauer's instructions to cut down loose roof, wher encountered was contrary to safe mining practice. Further for Rauer to permit partial pillaring on the left side of the section was, as the Division Manager found, a factor that contributed to override pressure on the roof.

Responsibility for the roof fall must be attributed t the entire chain of command--from the mine superintendent the continuous miner operator. What occurred was not an a of God nor an unavoidable accident. Both Mr. Singleton's and Mr. Binns's evaluation of the situation was deplorable And if Mr. Rauer is to be believed, their training and instructions were fatally deficient. Mr. Rauer's sharp disagreement with his own Division Manager over the contri causes of the fall indicates a disarray on the part of top management that is hardly reassuring. Based on the eviden considered as a whole, I would have to agree that as MSHA

> The accident occurred due to the failure of management and the workmen to properly evaluate

the mouth of the pillar split. The evidence clearly supports MSHA's determination that under accepted practice as well as the drawings attached to the roof control plan the operator was allowed to round or notch the corner of a pillar split and thereby widen the mouth to more than 20' and narrow the outby fender to less than the 12.5 feet for a distance of 12 to 18 inches in order to get the continuous miner positioned to make the "A" run. The technical violation involved did not contribute to the roof fall. Accordingly, the motion to vacate this citation was approved as part of the overall settlement of this matter.

The District Conference

Shortly after the investigative report issued, this matter came on for a conference at the District Office in Morgantown, West Virginia. 30 C.F.R. 100.6. 6/ The District Manager designated Robert L. Crumrine, an experienced CMI and roof control expert, to act as the Conference Officer. Present at the conference was Larry Rauer, the mine superintendent, and later John Dower the inspector responsible for the citations and investigative report.

Mr. Dower was about 45 minutes late for the conference and by then Mr. Crumrine had made up his mind about the matter. 7/ This was not unusual as in 9 out of 10 cases the issuing inspector is not permitted to attend the conference.

6/ The conference procedure is a method of informal adjudication not specifically provided for under the Act. Under this procedure, District Managers are encouraged to eschew the role of vigorous enforcers and become "cooperative regulators."

7/ Mr. Dower said he was late because he was not alerted to the fact that his presence was requested until shortly before the conference convened on the morning of October 6, 1982. He said he was delayed by his unsuccessful efforts to obtain copies of the citations and his notes which were locked up in his supervisor's office.

8/ While the governing instructions provide that "MSHA inspectors will participate in the review of the citations and orders," this is subject to the discretion of the District Manager. 47 F.R. 22293 (1982).

reading a statement by Mr. Binns. Mr. Binns statement claimed he sounded the roof in the No. 3 entry in the are where the "B" cut was to be started while Mr. Singleton w positioning the continuous miner for the "B" run. He did not deny that he left the area after sounding the roof instead of staying to supervise and control the dimension of the "B" cut.

Mr. Crumrine said he was satisfied there was a viola of 75.205 but felt the charge of an unwarrantable failure sound the roof was unfair to Mr. Binns. 9/ Mr. Crumrine believed Binns had adequately sounded the roof in the No. entry before the "B" run was started. Since he left the area immediately thereafter and was not present when Sing encountered the loose roof, Crumrine did not think he cou be held accountable for Singleton's failure to properly evaluate the situation.

With respect to Mr. Singleton's actions, Mr. Crumrin said it is against MSHA policy to hold an operator respon for unwarrantable failure violations attributable to cont miners. 10/ Thus when he concluded that Mr. Binns, the section foreman, had sounded the roof adequately and was responsible for the failure to provide additional roof

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9/ The graveman of the case presented by the solicitor turned on the failure of Binns and Singleton to provide additional roof support in the presence of the dangerous condition revealed by the initial working of the roof nea the clay vein with knowledge, by Singleton, of the crack observed while making the "A" run.

10/ This policy fails to take into account situations wh the contract miner's actions are properly imputable to th operator because of faulty training or instructions. Whether miners acting as adjudicators under the informal procedures that prevail at district conferences can be expected to apply the nuances of the law of vicarious liability seems doubtful.

Mr. Rauer was satisfied with this disposition as it removed the stigma of the unwarrantable failure finding both as to Mr. Binns and the operator. Mr. Dower on the other hand felt that he had not had a fair opportunity to be heard especially in view of Mr. Crumrine's haste to convene and conclude the matter without considering the report and findings, so recently approved by the District Manager and MSHA, with respect to management's responsibility for the fatality. He protested Mr. Crumrine's decision to his supervisory inspector Mr. Vasicek. Mr. Vas after consultation with Mr. Lawless, assistant to the Distr Manager, told Mr. Dower that Mr. Crumrine's ruling would nc be adopted by the District Manager and that the citations were affirmed as issued. This was confirmed by letter of October 14, 1982 from the District Manager to Mr. Rauer.

To placate the operator, Mr. Vasicek told the assessme office on December 14, 1982 that "The negligence of both th foreman and the machine operator (Binns and Singleton) cont buted to the accident. The machine operator should have backed out all the way and stayed out when he saw the roof was 'working.' The penalty should be fairly low." (Emphas supplied.)

Why the supervisory inspector undertook to suggest the assessment office ignore the inspector's evaluation of the operator's negligence is puzzling. Especially since the inspector who wrote the citations and the investigative report was, until the hearing, never told that his supervis whom he was led to believe supported his evaluation, had sought to persuade the assessment office to let the operatc off with a "fairly low" penalty. 11/

11/ If this account accurately reflects MSHA's policy of conferencing in action, it is small wonder there are widespread reports of how the new enforcement philosophy has demoralized rank-and-file inspectors. Such behind-the-scen manipulation of MSHA's ostensible role as chief enforcer of the Mine Safety Law can lead to the perception that cooperation is being used as a cloak for capitulation. A recent report by the International Health and Safety Commit of the UMWA expressed concern over "the frequency with whic MSHA supervisors cave in to operator pressure and downgrade

Bethlehem, not satisfied with this "fairly low" assessment, filed a notice of contest. In due course, the solicit filed the Secretary's proposal for penalty with the Commissi After assignment, the trial judge issued a pretrial order. In response, the operator raised as a defense, Mr. Crumrine' ruling at the conference of October 6, 1982.

On or about May 19, 1983, the solicitor called the trial judge to seek a postponement for compliance with Part of the outstanding pretrial order on the ground the District Manager had decided to settle the matter by reinstating Mr. Crumrine's ruling of October 6, 1982 and accepting a penalty of $500. To expedite the matter, the District Manager directed the inspector, Mr. Dower, to issue the modifications necessary to effect a reduction of the charge in the (d)(1) citation and to vacate the 104(a) citation. Mr. Dower followed orders but the modifications were rescinded when the trial judge refused to approve the settlement.

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fn. 11 (continued)
citations that have been issued by the inspectors in the field." The same report also noted that:

> Unfortunately, these days, it seems that the MSHA inspectors who are not afraid to enforce the Act wind up having to defend themselves, not only against the operators but also against their own supervisors. Committee members related conversations with MSHA inspectors that confirmed the view that the weakened enforcement approach we have seen in the field results from the message that has been sent down from the top agency heads. Vigorous enforcement of mandatory health and safety standards has been viewed as "nit picking" and the message to the inspecto in the field has been clear: back off, and if you cite a condition at all, cite it as a non s&s (nonserious) violation.

to adjudicate the matter de novo. This defense dissolve in the light of disclosures that, to say the least, refl poorly on the independence, objectivity and neutrality o district conference procedure.

As pictured in this record, the district conference cedure has a potential for seriously undermining the det effect of the civil penalty provisions of the Mine Safet Law. 12/ In this case, the conference officer on the ba of an informal discussion with a representative of the operator chose to dismiss the unwarrantable failure char on the roof fall violation because he did not want to stigmatize a member of supervisory management. This myopic view of what actually occurred was then used to justify a reduction in the amount of the civil penalty warrantcd for the institutional failure responsible for the fatality. Without even reading the official MSHA fa accident report, Mr. Crumrine, based solely on what the operator's mine superintendent told him, concluded that because Mr. Binns was not alone guilty of an unwarrantab failure violation and Mr. Singleton was not, under MSHA policy, chargeable with such a violation Bethlehem, as operator, was responsible only for a strict liability, n fault violation to which no culpability would attach. T District Manager sub silencio, followed through on this evaluation by indicating to the assessment office that t negligence of Binns, Singleton and the operator be consi

12/ While a new administration has the right to try a n philosophy of enforcement implicitly endorsed by the dem process, it is axiomatic that the leaders of every admin tion are required to adhere to the dictates of statutes are also products of democratic decisionmaking. Unless administration can convince Congress to change those pro of the Mine Safety Law it finds objectionable, it is its duty to enforce the statutory mandate in a manner consis with the original Congressional intent. A new administra may not refuse to enforce a law of which it does not app Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., ____ U.S. ____ 77 L. Ed 2d 443 n. June 24, 1983) (Rhenquist, J. in concurring). Prosecuto discretion does not extend to nullifying or recreating l without changing it through the legislative process. Th are statutory and constitutional limits on the discretio

110(k) of the Act shows that Congress felt the public interest in vigorous enforcement is best served when the process by which penalties are assessed is carried out in public, "where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process." S. Rpt. 95-181, 95th Cong. 1st Sess. 44-45 (1977). As the Senate Report continued, "the Committee intends to assure that the abuses involved in the unwarrante lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequatel protected before approval of any reduction in penalties." Id

The conference procedure permits MSHA to circumvent the statutory protection against the abuses found by Congress. Recent studies show that the average penalty assessed has dropped from $177 to $80, a reduction of some 45%, since the conference procedure was inaugurated. The disturbing conclusion is that the philosophy of deregulation made manifest in the conference procedure has led to a marked reduction in th deterrent effect of the civil penalty and thereby encouraged operators to flout the law. 13/

The civil penalty assessment was designed to encourage management at all levels to respond positively to health and safety concerns. The legislative history of the Mine Safety Law shows Congress intended to place responsibility for compliance with the Act on those who control or supervise the operation of mines as well as on those who operate them on a day-to-day basis. S. Rep. 91-411, 91st Cong. 1st Sess. 39 (1969); S. Rep. No. 95-181, 95th Cong. 1st Sess. 40 (1977). Upper level management decisions such as those

13/ Since May 1982, approximately 75% of all violations charged have been assessed at $20. A recent study shows that the policy of cooperative enforcement has resulted in a sharp upturn in fatality rates in underground and surface bituminous coal mines. Weeks and Fox, Fatality Rates and Regulatory Policy in Bituminous Coal Mining, United States, 1959-1981, 73 AJPH 1278 (1983).

of $20 is a positive disincentive to management's commitment to safety and a triumph of expediency over effective enforce

As a recent report by the National Academy of Sciences found, top managements' commitment is of primary importance in achieving compliance with safe mining practices and must be constantly reinforced by strict and effective enforcement at the federal level. The movement toward compromise and dilution of the federal enforcement effort reflected in this record indicates the forces of change may have shifted too far in the direction of deregulation. 14/

14/ Thought should be given to returning enforcement to its traditional role. Experience under the Coal Act demonstrate that confusion of the policing or enforcement function with the consultative and adjudicatory functions is bad policy and detrimental to both effective enforcement and fair adjudication.

I thought that in 1977 Congress made a conscious decisi to structure the regulatory scheme so as to preclude trade-offs to vigorous safety enforcement. The legislative histor of the Mine Act shows the enforcement function was transferr from the Department of the Interior because of its conflict with that Department's responsibility for maximizing product of the nation's coal resources. It was felt that "no confli could exist if the responsibility for enforcing and administ ing the mine safety and health laws was assigned to the Department of Labor since that Department has as its sole du the protection of workers and the insuring of safe and healt ful working conditions." Sen. Rep. 95-181, supra, 5. A safe mining operation is not a function of the art of the cost accountant. It requires a strong, almost a "religious, commitment by management, labor, and the regulatory agency. BNA Interview With David A. Zegeer, Assistant Labor Secretar for Mine Safcty and Health, December 9, 1983, published in Current Report, Mine Safety & Health Reporter, December 26, 1983, at 605.

the roof, face and ribs before any work or machine is started, and as frequently thereafter as necessary to insure safety. When dangerous conditions are found they shall be corrected immediately.

By contrast, the approved roof control plan provides:

Where miners are exposed to danger of falls of roof, face and ribs the workmen shall examine and test the roof, face, and ribs before any work or machine is started, and as frequently thereafter as necessary to insure safety. The roof shall be examine visually and by the sound and vibration method. Except the sound and vibration method shall not be conducted where adverse roof conditions (slips, clay veins, etc.) are detected during visual examinations. When dangerous conditions are found, they shall be corrected immediately. (Emphasis supplied.)

Inspector Dower testified that his understanding of th mandatory standard and the roof control plan was that the continuous miner operator, Singleton, who denied knowing of the existence of the clay vein in the right rib of the "B" cut, was required to examine the roof visually and by the sound and vibration method when he observed the large rock (18" by 6" by 4") fall on his machine during his first cut of the "B" run and that his failure to do so was unwarranta Mr. Dower felt the standard made no exception for the "adve roof conditions" referred to in the roof control plan but recognized that it might be unsafe to use the sound and vibration method to "test" a roof as loose and dangerous as that encountered in the "B" cut.

Mr. Crumrine, MSHA's roof control expert, said that wh visual observation such as the falling rock and/or the flaking and dribbling from the clay vein signalled the pres of a loose roof condition the safe and prudent course of action was to withdraw the machine to a position under supp roof and then set such roof support as would be necessary t insure the hazardous condition was abated. He cautioned against drumming or sounding the roof until some temporary support was provided as this might in itself trigger a roof fall.

control plan was intended to ameliorate, if not resolve, conflict. It is intended that the language of the precau take precedence over the standard and to say, in effect, that notwithstanding the provisions of the mandatory stan a roof should not be "tested" by the sound and vibration method in the presence of a dangerous, hazardous or adver condition such as a slip or clay vein.

A further difficulty that should be clarified is the fact that the Inspection Manual states that "The word 'Operator' in this provision [75.205] means the operator as defined in Section 3(d) of the Act. However, roof tes can be made by persons designated by the operator." Inspection Manual II-219 (1978). If this means what I think it means, Singleton may not have been the individua designated by the operator to make a sound and vibration test of the roof. At least no evidence was offered by MS to show that he was. The evidence shows only that Binns the section foreman made the tests. And certainly if Singleton and the other facemen were not qualified to mak a sound and vibration test there is reason to question th competency to correctly evaluate a hazardous roof conditi on the basis of visual observation alone--a much more dif cult task.

The roof control plan, on the other hand, authorizes "workmen" to "examine and test" the roof which may mean t Singleton, as a faceman, was presumably qualified to test the roof. Thus we have another inconsistency between the standard and the roof control plan which makes for diffic in assigning individual responsibility for the alleged unwarrantable failure to evaluate properly the roof condi

On September 2, 1983, MSHA issued a preproposal draf revisions to the roof control standards. 48 F.R. 40165. standard on roof testing has been redesignated as 75.210 in pertinent part provides:

sound and vibration roof tests shall be made. The sound and vibration test shall:

(1) Be conducted after the ATRS system is pressured against the roof inby the area to be tested; or

(2) Begun under permanently supported roof and progress no more than 5 feet into the unsupported area. This test shall be made only for the purpose of preparing to manually install roof support when an ATRS system is not required by § 75.207.

(b) When a hazardous condition is detected, the condition shall be corrected immediately or a danger sign posted at a conspicuous location prior to leaving the area.

(c) Overhangs and loose roof, faces and ribs shall be taken down or supported.

(1) A bar for taking down loose material shall be provided on all face equipment, except haulage equipment.

(2) Each bar used to take down loose material shall be of a length and design that will enable a person to perform work from a location that will not expose the persons to injury from falling material.

(3) Loose material shall be taken down from an area supported by permanent roof supports or an ATRS system. If an ATRS system is not required by § 75.207 and the loose material cannot be taken down from a permanently supported area, at least two temporary supports on not more than 5 foot centers shall be set between any person and the material being taken down.

his designee for making roof tests. Designations of
or day rate miners should be in writing and furnished to
to be kept as part of the operator's records.

A review of the proposed revision confirms that Mr.
instructions for cutting down loose roof with the mining
does not accord with commonly accepted safety standards.
confirms Mr. Crumrine's view that the existing standards
contemplate using the sound and vibration test under unsu
roof for more than 5 feet into the unsupported area. It
also establishes that once the rock fell Singleton should
withdrawn his machine, set temporary supports, tested the
"discovered" the clay vein, traced the slip crack, consul
with Binns and, if necessary Rauer, and then on the basis
considered judgment decided whether to go for the coal or
abandon the pillar as too risky. Instead Singleton on th
basis of faulty training and instructions made a snap jud
ment to go for production and subordinate safety that cos
Hodges his life and put several other lives at risk. And
in the long run, as Rauer testified, the operator had to
abandon the coal in the entire pillar line. Once again t
teaching is that a safe operation is the most productive
operation.

Since enactment of the Coal Act in 1969 over 1200 mi
have died in the nation's underground mines--42% of them
the result of roof or rib falls. MSHA's studies show tha
fatalities due to roof and rib falls are attributable to
main reasons: (1) failure to follow safe procedures, and
(2) hazardous conditions that went undetected until too l
Both of these reasons were present in the case of Mr. Hod
death.

Summing Up

Summing up I conclude there was more than enough bla
to go around. The contract miners had the last clear cha
to prevent the roof fall; instead they triggered it. The

15/ See also, Bureau of Mines Instruction Guide 17, Roof
Rib Control; Programmed Instruction Book, Roof and Rib Cor
National Mine Health and Safety Academy.

instilled in his subordinates an attitude toward safe mining practices and procedures that would have prevented the accident. Lastly the division manager took no steps to discipli the mine superintendent for his failure to supervise his subordinates properly or to provide the training and instruc tions that would insure a safe operation.

The real problem at the #108 mine, of course, was attitudinal. At every level the supervisors and workers had been indoctrinated with the need to subordinate safety to production. How else explain such a take-a-chance policy as that embodied in the superintendent's instructions to cut down loose roof in the presence of clay veins and slip cracks. Mr. Crumrine's sympathy for Mr. Binns notwithstandi it is beyond doubt there was an institutional failure here that demands immediate correction.

The collective failure of management and the contract miners warranted the imposition of a penalty that underscores the gravity of the institutional failure--a failure that resulted from faulty engineering, poor training and lax enforcement. Such a disposition is fairer than singling out Mr. Binns. While it is natural to seek a scapegoat for disaster, the institutional responsibility in this case transcends the individual responsibility of Mr. Binns.

For these reasons, I approved a settlement that involve the payment of a $5,000 penalty and vacation of the unwarran failure charge as to Mr. Binns.

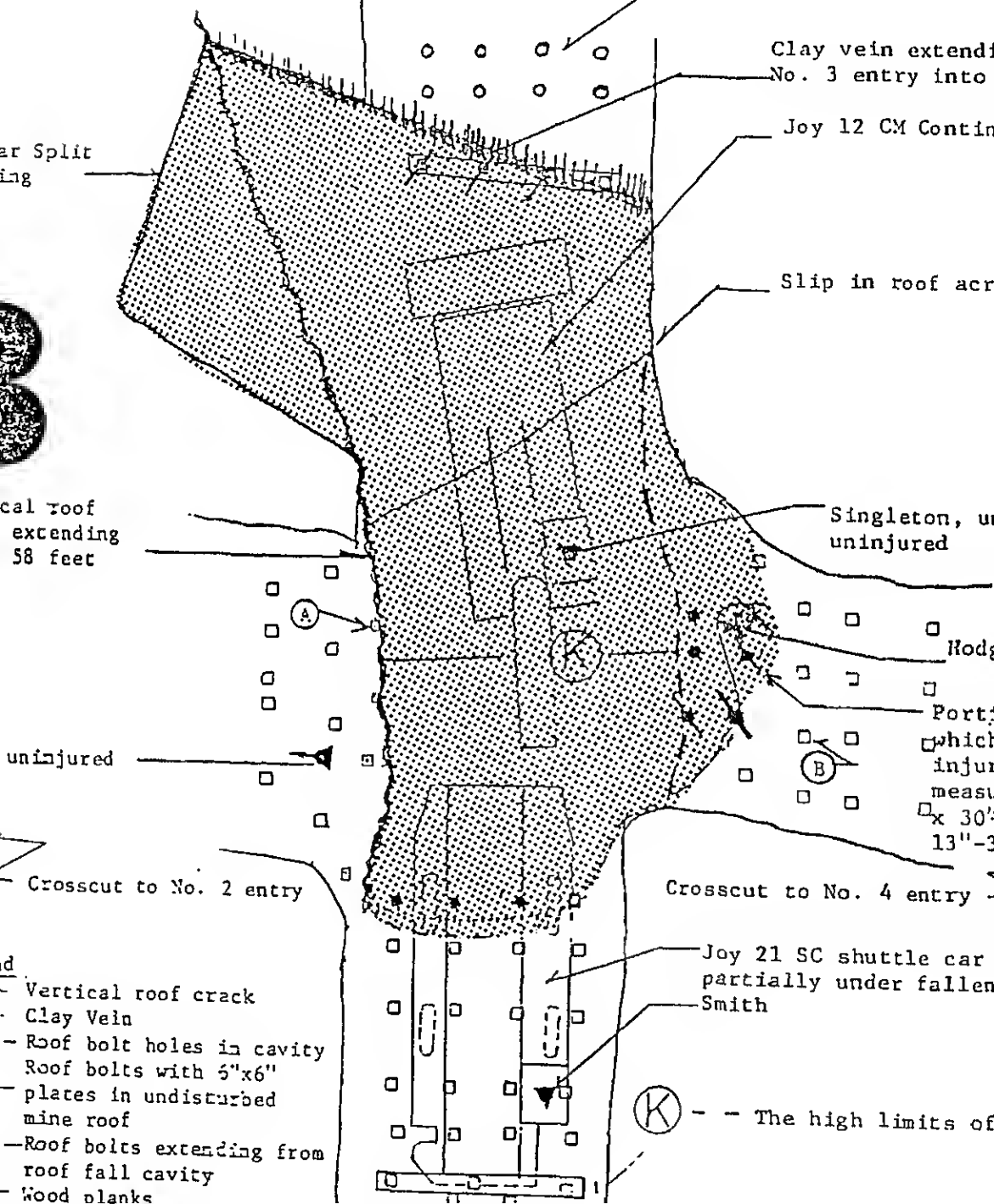
Accordingly, it is ORDERED that the bench decision approving settlement of this matter be, and hereby is, CONFIRMED and the captioned matter DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

Attachment

Distribution:

Covette Rooney, Esq., Office of the Solicitor, U.S. Departme of Labor, 3535 Market St., Philadelphia, PA 19104 (Certifi


Clay vein extendi
No. 3 entry into
Joy 12 CM Contin
Slip in roof acr
Singleton, u
uninjured
Crosscut to No. 2 entry
Crosscut to No. 4 entry
Joy 21 SC shuttle car
partially under fallen
Smith
K - - The high limits of
Vertical roof crack
Clay Vein
Roof bolt holes in cavity
Roof bolts with 6"x6"
plates in undisturbed
mine roof
Roof bolts extending from
roof fall cavity
Wood planks

ON BEHALF OF	:	
JACK LEWIS KIEFER,	:	MSHA Case No. DENV CD 82
Complainant	:	
v.	:	King Coal Mine
	:	
NATIONAL KING COAL, INC.,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Carlson

The parties have submitted a stipulation and settlement agreement which, if approved, will resolve all issues in this discrimination case.

Under the terms of the agreement, respondent, National K Coal, Inc. (National), agrees to pay to Jack Lewis Kiefer the sum of $7,500 as back wages and compensation for all other al damages resulting from his discharge. National further agree expunge from complainant's employment record any adverse refe to his discharge.

Complainant, in turn, relinquishes any claim for reinsta with National.

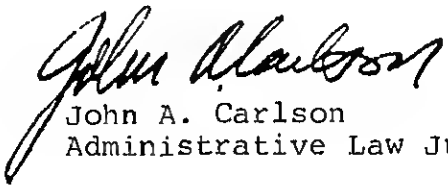
Having reviewed the file and considered the circumstance conclude that the settlement should be approved. Accordingly agreement of the parties is approved in its entirety.

Pursuant to the payment terms incorporated in the agreem National shall tender to Jack Lewis Kiefer through the United Department of Labor at 1585 Federal Building, 1961 Stout Stre Denver, Colorado 80294, the following installment sums on the following dates: $2,500.00 on or before January 15, 1984; $2 on or before February 15, 1984; and $2,500.00 on or before Ma 1984, for a total sum of $7,500. Additionally, should Nation to tender any installment due under this order within 30 days its due date, it shall pay to Jack Lewis Kiefer, through the States Department of Labor, at the address aforesaid, a penal the amount of $1,000.00, which shall be in addition to and no lieu of any existing remedies for failure to comply with an o this Commission.

to his discharge.

In view of this settlement, this discrimination proce
is dismissed.

SO ORDERED.



John A. Carlson
Administrative Law Judge

Distribution:

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718 Seventeenth Street, Suite 1500, Denver, Colorado 8020
(Certified Mail)

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDI Docket No. WEST 81-402 A.C. No. 04-00010-0502
v.	:	Crestmore Mine
ROBERT KLEIN, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Vail

This is a civil penalty proceeding filed by the petitio against Robert Klein, (hereinafter "Klein"), as an individua agent of the Riverside Cement Company, the corporate operato the Crestmore Mine located in Riverside, California. Klein this case was acting as the operator's safety director at th Crestmore Mine.

On November 1, 1979, Order No. 375785 was issued by the Safety and Health Administration to the Riverside Cement Com pursuant to section 107(a) of the Federal Mine Safety and He Act, 30 U.S.C. 817(a), citing a violation of safety standard C.F.R. § 57.15-5. 1/ Said order reads as follows:

> A serious accident occurred at the Crestmore Mine when an employee entered the feed hopper at the dynapactor (crusher) to free a bridged material hangup. The bridged material broke through dropping the employee onto the pan feeder and loose material from above came down covering the employee. Safety belts, lines, and a person in attendance on the line were not being used in this dangerous location.

1/ 30 C.F.R. § 57.15-5 provides as follows:

Klein was charged in this case under section 110(c) Act, 30 U.S.C. § 820(c), with knowing, authorizing, or carrying out said violation charged above against Rive Corporation, as their agent.

The petitioner filed a civil penalty proceeding ag Klein, proposing the assessment of a $300.00 civil pen matter was set for hearing on November 16, 1982 in Riv California. On November 15, 1982, the petitioner and a joint motion for approval of a settlement and for dis this case. Klein tendered a check for $100.00 in sett the proposed civil penalty and indicated he no longer contest the charges against him.

The parties represent that there was a serious vio this case involving an accident wherein a miner sustai injuries, multiple abrasions and lacerations. However mitigating factor, Klein was not directly supervising miner at the time of the accident. Also, Klein showed after notification of the violation in helping to impl mine safety meeting, proper procedures for when and wh safety belts and lines to guard against a future occur similar accident.

Based on a review of the record in this case and representations of the parties, I find the settlement in accord with the purpose and policy of the Act.

ORDER

Accordingly, it is ORDERED that the motion by the and Klein be, and hereby is, GRANTED. It is further O upon clearance of Klein's tendered $100.00 check as pa offered sum herein, the captioned matter is DISMISSED.

Virgil E. Vail
Administrative Law Judge

Distribution:

J. Philip Smith, Esq., Office of the Solicitor

CRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 81-406-M
Petitioner	:	A.C. No. 04-00010-05025 A
	:	
v.	:	Crestmore Mine
	:	
YNE KENDALL,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

fore: Judge Vail

This is a civil penalty proceeding filed by the petitioner ainst Wayne Kendall, (hereinafter "Kendall"), as an individua ent of the Riverside Cement Company, the corporate operator o e Crestmore Mine located in Riverside, California. Kendall i is case was acting as the operator's plant manager at the estmore Mine.

On November 1, 1979, Order No. 375785 was issued by the Mi fety and Health Administration to the Riverside Cement Compar rsuant to section 107(a) of the Federal Mine Safety and Healt t, 30 U.S.C. 817(a), citing a violation of safety standard 30 F.R. § 57.15-5. [1]/ Said order reads as follows:

> A serious accident occurred at the Crestmore Mine when an employee entered the feed hopper at the dynapactor (crusher) to free a bridged material hangup. The bridged material broke through dropping the employee onto the pan feeder and loose material from above came down covering the employee. Safety belts, lines, and a person in attendance on the line were not being used in this dangerous location.

---

30 C.F.R. § 57.15-5 provides as follows:
ndatory. Safety belts and lines shall be worn when men work

The petitioner filed a civil penalty proceeding a
Kendall, proposing the assessment of a $300.00 civil p
This matter was set for hearing on November 16, 1982 i
California. On November 15, 1982, the petitioner and
filed a joint motion for approval of a settlement and
dismissal of this case. Kendall tendered a check for
settlement of the proposed civil penalty and indicated
longer wished to contest the charges against him.

The parties represent that there was a serious vi
this case involving an accident wherein a miner sustai
injuries, multiple abrasions and lacerations. However
mitigating factor, Kendall was not directly supervisin
injured miner at the time of the accident. Also, Kend
good faith after notification of the violation in help
implement, at a mine safety meeting, proper procedures
and where to use safety belts and lines to guard again
occurrence of a similar accident.

Based on a review of the record in this case and
representations of the parties, I find the settlement
in accord with the purpose and policy of the Act.

ORDER

Accordingly, it is ORDERED that the motion by the
and Kendall be, and hereby is, GRANTED. It is further
that upon clearance of Kendall's tendered $100.00 chec
of the offered sum herein, the captioned matter is DIS

Virgil E. Vail
Administrative Law Judge

Distribution:

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Enos C. Reid, Esq., Reid, Babbage and Coil, 3800 Orang
P.O. Box 1300, Riverside California 92502 (Certified

ECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-12-M
Petitioner	:	A.C. No. 04-00010-05026
	:	
v.	:	Crestmore Mine
	:	
EN POWELL,	:	
Respondent	:	

DECISION APPROVING SETTLEMENT

efore: Judge Vail

This is a civil penalty proceeding filed by the petitione gainst Ben Powell, (hereinafter "Powell"), as an individual a f the Riverside Cement Company, the corporate operator of the restmore Mine located in Riverside, California. Powell in th ase was acting as the operator's plant manager at the Crestmo ine.

On November 1, 1979, Order No. 375785 was issued by the M afety and Health Administration to the Riverside Cement Compa ursuant to section 107(a) of the Federal Mine Safety and Heal ct, 30 U.S.C. 817(a), citing a violation of safety standard 3 .F.R. § 57.15-5. 1/ Said order reads as follows:

> A serious accident occurred at the Crestmore Mine when an employee entered the feed hopper at the dynapactor (crusher) to free a bridged material hangup. The bridged material broke through dropping the employee onto the pan feeder and loose material from above came down covering the employee. Safety belts, lines, and a person in attendance on the line were not being used in this dangerous location.

/ 30 C.F.R. § 57.15-5 provides as follows:

carrying out said violation charged above against Riverside Corporation, as their agent.

The petitioner filed a civil penalty proceeding against Powell, proposing the assessment of a $300.00 civil penalty. matter was set for hearing on November 16, 1982 in Riverside California. On November 15, 1982, the petitioner and Powell a joint motion for approval of a settlement and for dismissa this case. Powell tendered a check for $100.00 in settlemer the proposed civil penalty and indicated he no longer wished contest the charges against him.

The parties represent that there was a serious violatic this case involving an accident wherein a miner sustained ba injuries, multiple abrasions and lacerations. However, as a mitigating factor, Powell was not directly supervising the i miner at the time of the accident. Also, Powell showed good after notification of the violation in helping to implement, mine safety meeting, proper procedures for when and where to safety belts and lines to guard against a future occurrence similar accident.

Based on a review of the record in this case and the representations of the parties, I find the settlement propos in accord with the purpose and policy of the Act.

ORDER

Accordingly, it is ORDERED that the motion by the petit and Powell be, and hereby is, GRANTED. It is further ORDERE upon clearance of Powell's tendered $100.00 check as payment the offered sum herein, the captioned matter is DISMISSED.

Virgil E. Vail
Administrative Law Judge

Distribution:

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United States Department of Labor, 4015 Wilson Boulevard
Arlington, Virginia 22203 (Certified Mail)

Enos C. Reid, Esq., Reid, Babbage and Coil, 3600 S.

ILLIAM A. HARO, Complainant	:	DISCRIMINATION PROCEEDINGS
v.	:	Docket No. WEST 79-49-DM
	:	MD 79-05
	:	Docket No. WEST 80-116-DM
AGMA COPPER COMPANY, Respondent	:	MD 78-43
	:	San Manuel Mine

DECISION

ppearances: Paul F. Tosca, Jr., Esq., Tucson, Arizona, for Complainant;
N. Douglas Grimwood, Esq., VanCott, Bagley, Cornwall & McCarthy, Phoenix, Arizona, for Respondent.

efore: Judge Morris

On November 30, 1982, the Federal Mine Safety and Health eview Commission remanded Docket No. WEST 80-116-DM and nstructed the judge to analyze whether respondent Magma Coppe mpany, "proved that it would have transferred Haro anyway fo egitimate business reasons, regardless of his protected refus cut the B.O. car", 4 FMSHRC 1935, 1941. Subsequently, in a parate order, the Commission directed the judge to make his ndings as to the merits of the respondent's defenses on the sis of the record presently before him, 5 FMSHRC 805.

Prior to ruling on respondent's defense the parties were anted an opportunity to file briefs. After receipt of the iefs, and a review of the issues, the judge entered an inter der reaffirming complainant's claim of discrimination. The terim order, with a few clarifying changes, is restated here

Inasmuch as the interim order reaffirmed the claim of scrimination it became necessary, by virtue of the order of mand, to determine what amount, if any, was due to complaina lieu of a further hearing on damages the parties submitted ipulation concerning back pay, interest, attorneys fees and ecial damages. The stipulated facts are discussed, infra,

evidence of both parties. Such evidence is summarized in
decision in the same order as it was received at the heari
follows:

Complainant William Haro

The discrimination occurred on June 13, 1978 when disp
Lockhart instructed Haro to remove a bad order (B.O.) car
production train. Lockhart is the dispatcher of supervisor
personnel with the same pay rate as Stonehouse. Haro refus
because Lockhart would not assign another person to assist
(Tr. 15, 60-61).

After Haro refused to remove the B.O. car, Stonehouse
recommended that Haro call Frank Torres, (Haro's supervisor
his home. Stonehouse, the shaft boss, reports to Cothern
59, 60, 62). In the ensuing telephone conversation Torres
Haro to return to his maintenance work (Tr. 66).

Before this incident occurred Haro had received writte
instructions, in the form of a company memorandum, to the
that two men were to be used when a railroad car was cut f
train (Tr. 57, Exhibit C2).

Haro did not contact Cothern about his refusal to cut
B.O. car; nor did he contact the mine mechanic supervisor
64-65).

After the tail light bracket incident (which occurred
following day) Haro submitted a grievance. At Torres's re
Haro held the grievance until he [Torres] had an opportuni
look at it (Tr. 70, 71).

On two prior terminations Haro quit respondent to see
employment elsewhere (Tr. 53). Haro did not recall any sp
conflicts with supervisors (Tr. 53).

After the B.O. car incident Navarro told Haro he was
him from dump mechanic to another underground position on
days. This was because Navarro wanted to protect Haro fro
Cothern. It was Navarro's responsibility to keep harmony

avarro was to try to work out differences with Cothern. The eeting didn't go any further than the second step of the rievance procedure. Haro received a letter from the general anager indicating it was not a proper subject for a grievance e refused to hear it (Tr. 78-82).

On June 23 (or June 25) Haro received a notice that he wa eing removed as dump mechanic and placed on straight days (Tr 25, 226). He then called MSHA (Tr. 226, 227).

The "stress" started about June 13th (Tr. 227).

Witness Frank Torres

Frank Torres, a supervisor in the mechanical division, wa amiliar with the incident of June 13, 1978. On this date a spatcher (Lockhart) asked Haro to remove a B.O. car from a roduction train (Tr. 89-92, 111). Because he was to do it al aro refused and called Torres at home.

Torres told Haro they would have someone help him remove ar (Tr. 91-92). It would violate company policy not to provi aro with an assistant to remove the car (Tr. 92). In their p onversation, Torres asked Haro to request that his shift boss urnish someone to assist (Tr. 92-93). Stonehouse was the sha oreman. Further, Torres told Stonehouse on the extension to aro himself or to provide someone to assist. Stonehouse agre Tr. 111). Torres assumed Stonehouse provided the assistant t ut the ore car (Tr. 92-93). Torres and Stonehouse are on abo he same management level (Tr. 111-112).

Haro was acting in accordance with instructions from Torr hen he called him at home (Tr. 93). Torres tells this to eac s dump mechanics. They may call Torres or his supervisor, avarro (Tr. 93).

On June 15 Haro came to Torres with a grievance regarding onflict over the tail light matter that had occurred between d Cothern (Tr. 105-106). Torres told Haro to hold onto his rievances a couple of days. Torres wanted to try to smooth i er without going through the grievance procedure (Tr. 105-10

This witness is section foreman of the three shaf

Navarro testified that Haro's transfer to the sur could be a direct result of the airslusher accident (T

Concerning the ore cars: Mechanics are to go to t operating department and get a helper. They are not t ore cars by themselves (Tr. 132).

Navarro put Haro on straight days because of the with Cothern. The statements were made by Cothern tha arguing, and a big shot. Cothern didn't want him (Tr.

Witness John Zagorsky

It seemed to this witness, who replaced Haro as c mechanic, that "they" were pressuring Bill Haro all of (Tr. 174). By "they", Zagorsky means management consi Frank Torres, John Traynor, Tom Traynor, and Rudy Nava pressure included undue stress. Also there was a sile when they refused to talk to Haro. They would also ne ask more than the usual questions. There was more sil treatment than needling (Tr. 186).

The Torres to Haro conversation [about the grease more of a form of harassment than an explanation (Tr. is not a troublemaker. But he is conscious of what is him and willing to speak up (Tr. 174, 175).

Harry Miller, Thomas Traynor, Tom Howard, Gregory Donald Graham also testified for Haro. However, those did not offer any evidence relevant to the issues now considered.

Respondent's Evidence
Witness Robert Zerga

Robert Zerga, Magma's development superintendent, responsible for the maintenance division (Tr. 285).

Zerga did not recall the chronological order, but personnel problem involving Haro was when Frank Bunch him that he had a confrontation with Haro off the job.

ause Haro had called the maintenance people instead of dealin
h Cothern who was in his chain of command (Tr. 291). The
ediate result was that Cothern and Haro met to solve the
blem and rectify the situation (Tr. 292). The meeting went
rly and it did not resolve the problem but amplified it. The
e grievances turned in by Haro saying he was being set up and
criminated against (Tr. 292).

After discussing the matter with Haro's foreman, Zerga felt
only reasonable position the company could take was to
arate the two individuals because of an irreconcilable
ference or conflict. They were separated. Haro was taken o
dump mechanic and put in the same area working for the
hanical foreman (Tr. 292). Zerga felt Haro required more
ervision than he was receiving as a dump mechanic (Tr. 292).

At the time of Haro's removal from the dump mechanic posit
scenario was this: Cothern said that he didn't like someone
ng off the job when he [Cothern] could have resolved the
blem. And he had never asked Bill Haro to do anything that
afe or out of line. Haro said he was being harassed and
imidated, further he claimed Cothern was trying to set him up
get him fired (Tr. 314).

Lockhart was not Haro's boss and the problem was that Haro
not go to Cothern (Tr. 315). Stonehouse, the shaft foreman
ked for Cothern (Tr. 315).

Subsequent to the Bunch and Cothern incidents, Haro's patte
personality conflicts repeated themselves in subsequent
idents (Tr. 319). Through the grievance procedure it was
imed that Navarro, Torres, and Traynor were trying to "get"
o. Pursuant to Haro's request he was moved to the surface.
er that he had problems in the new area into which he had bee
ed. He had problems with Leno Gonzales over the use of
ephones and over the use of wrong grease (Tr. 319). He had
blems where he [Haro] said "they're just harassing me" (Tr.
).

Witness Zerga had problems with finding a solution to Haro
evances. Concerning the grease line: Haro said he tried to
lain the situation to Torres but he (Torres) wouldn't let hi
. 335-336).

This witness (recalled) had been Haro's supervisor for on
nd a half years. One of his welders told Navarro that Haro h
moked a marijuana cigarette. Navarro contacted Haro. He sai
ouldn't happen again. 1/

The marijuana cigarette incident occurred six months befo
aro was assigned as a dump mechanic (Tr. 339, 340). It is a
iolation of company policy for a worker to have drugs in his
ossession while working (Tr. 342-343).

Discussion

The Commission has ruled that an operator may produce
vidence in support of its legitimate business reasons to just
he challenged adverse action. In the words of the Commission
ordinarily an operator can attempt to demonstrate this by
howing, for example, past discipline consistent with that met
ut to the alleged discriminatee, the miner's unsatisfactory p
ork record, prior warnings to the miner, or personnel rules o
ractices forbidding the conduct in question," Bradley v. Belv
MSHRC 982, at 993 (June 1982). Belva does not exclude other
venues of evidence that would establish legitimate business
easons to justify the operator's defense.

But in this case respondent's evidence does not approach
the criteria mentioned in Belva. To the contrary, the evid
stablishes that Haro was transferred as a direct result of ha
ngaged in a protected activity.

The pivitol evidence arises from the testimony of witness
obert Zerga. This individual, as the person responsible for
ersonnel problems, clearly establishes the reason why Haro wa
ransferred. In the words of witness Zerga: "The problem came
attention because the mine operating group brought to my
ttention that Mr. Haro had, instead of dealing with Mr. Cothe
a problem, had gone outside and called maintenance people
nstead of dealing with the line of command that was at work"
1).

Notwithstanding whatever "line of command" existed at the
ne, Haro was justified in calling his superior at his home.
pervisors, Torres and Navarro, told him he could call "outsi
r. 93, 267). Such authorization was not only given to Haro
"each one" of the dump mechanics (Tr. 93).

Respondent claims Cothern was upset because Haro called side to maintenance. Although Cothern did not testify, as an stant superintendent, he should have knowledge of the tructions given to the dump mechanics by their supervisors.

Haro claims, and it is now the law of the case, that his sal to cut the B.O. car was a protected activity. In this ard he established a prima facie case. Commission decision, RC at 1941.

Was his subsequent telephone call to Torres a further tected activity? Or, as the defense urges, did that call ate respondent's chain of command.

Under some circumstances a telephone call to an operator's ervisor off of the worksite might not be a protected activity here the telephone call directly interconnected with Haro's sal to remove the railroad car. It was, in these unique cumstances, a protected activity.

Additional uncontroverted evidence indicates Haro did not aterally call Torres. Stonehouse, the shaft boss, recommend call be made (Tr. 59-62).

I agree with respondent that it is clear that Haro did not act Cothern concerning the B.O. car. No such contact was essary. Stonehouse, the shaft boss, recommended that Haro ca res. At that point Stonehouse hadn't been aware of the polic provide a worker to assist the dump mechanic when an ore car oved from the train (Tr. 62, 268). However, in talking to res, Stonehouse agreed to provide such an assistant (Tr. 111) concluded the matter. No further purpose would be served b going beyond Stonehouse and contacting Cothern.

Additional evidence in the case requires review. Witness ga testified concerning a personnel problem involving Frank h and Haro. This problem apparently arose out of a frontation between Bunch and Haro off of the job. Zerga lled this by instructing Bunch, an area supervisor, to exclud self from any problems involving Haro. He [Bunch] was to let foreman handle any problem (Tr. 291).

Without further supportive evidence I give no weight t
view that the Bunch incident was involved in the decision t
remove Haro as dump mechanic.

An additional issue arising from the evidence concerns
witness Navarro's testimony that Haro's transfer to the sur
could have been a direct result of the [airslusher] accider
125-126).

The foregoing evidence is entitled to zero weight. Wh
something "could" have caused Haro to be transferred lies w
the realm of possibilities and conjecture.

A final point raised by the evidence concerns the inci
where it is claimed that Haro smoked a marijuana cigarette.
use of drugs violates company policy. No one claims this w
involved in Haro's transfer. Respondent apparently thought
nothing of the incident because it subsequently assigned Ha
the position of dump mechanic.

Respondent's contentions after remand
and before interim order

In its brief filed after the order of remand and befor
entry of the interim order respondent urges various argumer
support of its position. The initial condition:

Respondent states that Haro could well be obstreperous
had been reassigned on six (6) different occasions due to h
inability to get along with supervisors. These reassignmer
respondent states, were not alleged to have been motivated
unlawful motives (Brief, page 5, paragraph 1).

I disagree with respondent's contentions. No evidence
supports the view that Haro was transferred on six differer
occasions. Respondent's assertions do not cite any part of
transcript. Further, I find no evidence supporting respond
statement. The evidence concerning transfers by Haro are s
in the foregoing summary of the evidence. There are two su
transfers. Both occurred after the B.O. car incident. The
was when Navarro transferred Haro off of the position of du
mechanic. The second was when Haro requested a transfer to
surface because he was being harassed.

essive absenteeism), as well as August 1973 (AWOL). These al
timate business reasons to terminate and to refuse to rehire
er. But the contradiction lies in the fact that Haro was
red after each of these terminations.

Respondent's brief does not cite any portion of the
script in its assertion that Haro couldn't get along with
rvisors. There is evidence that Haro "had problems" with
rson, Zunica, and Pena as well as Gonzales (use of telephone
wrong grease). Even if I assume these men were Haro's
rvisors I cannot overlook the obvious. These "problems" all
rred after Haro refused to remove the B.O. railroad car.
her, the record does not disclose what the "problems" were
een Haro and the first three individuals.

Respondent's second contention: On June 13, 1978 Haro was
d by a co-worker to cut a "bad order" car by himself. He
sed to do so. Instead of referring the matter to Cothern, h
rvisor on shift, he called a supervisor off shift at the
rvisor's home (Brief, page 5).

This contention has been discussed. To restate the holding
ehouse, the level boss, recommended the phone call and he
urred in Torres' suggestion. Haro did not have to take the
er to Cothern.

The third contention: Cothern deeply resented the Haro
phone call to another supervisor. Cothern told Haro he woul
to have Haro removed from his shift for that reason. Cother
the same explanation to Zerga, who had made similar decisio
rding Haro in the past (Brief, page 5).

Cothern did not testify and in fact he wasn't shown to have
on the shift at the time. But there is sufficient evidence
nfer Cothern's reaction to Haro. However, no defense is
blished. Haro was engaged in a protected activity. Cothern
Haro he would get him removed. He did.

Magma's claim that Zerga had made "similar decisions"
erning Haro can, on this record, relate only to the Bunch/Ha
dent. As previously discussed the Bunch/Haro incident is
out any reference to a time frame. Further, it is obvious

protected activity he can be demoted under a guise [illegible]
one that more supervision is required. But Zerga's stated
for removing Haro was because of the telephone call to the
maintenance people on the "outside." If a protected activi
part causes adverse action against a miner then a violation
Act occurs. As a matter of fact such a transfer as occurre
would eliminate the necessity of any telephone calls. A
supervisor would then be "on shift."

The fifth contention: Not one supervisor ever told Mr.
he had been wrong in refusing to cut the B.O. car (Brief, p
5).

I am unable to perceive how this assertion establishes
defense. Haro followed company policy and refused to cut t
car without assistance; then he called "outside" as he had
instructed to do. It is not relevant whether a supervisor
miner whether his actions are wrong. Haro, Torres, Navarro
the company memorandum all clearly establish a mechanic was
remove a railroad car without an assistant (Haro 15-16; Tor
92-93; Navarro 132; Exhibit C2).

The sixth contention: The San Manuel Mine employs 1,50
persons underground. Miners, craft persons and laborers ar
assigned work by their supervisors pursuant to orders which
supervisors themselves are given. The orders are carried o
an environment of noise, dust and frequent darkness amid he
machinery and explosives. If a supervisor loses control ov
men he supervises, disaster can result. In the present cas
Cothern did not order Haro to do an unsafe act. A co-worke
that request. Haro did not discuss it with Cothern or othe
follow the chain of command. He solicited instructions fro
supervisor off the job. This was in derogation of the auth
and responsibility given to Mr. Cothern as a supervisor (Br
pages 5-6).

This contention was previously discussed, but to brief
restate it: Magma's brief (pages 1, 2) shows a chain of com
with Haro as dump mechanic on a level with Lockhart. On th
echelon it shows the "level boss" to be Stonehouse. On the
level Cothern is listed as shift boss. Zerga is shown as t
final supervisor. When Stonehouse, on a level above Haro,
the issue, that concluded it. Cothern should know Haro had

authorized to call maintenance people on the outside. Further
the telephone call was legitimate since Stonehouse didn't know
about the company policy.

Magma's final statement in its brief is that neither
Cothern's request that Haro be reassigned, nor Zerga's grantin
that request, were so weak, so implausible or so out of line w
normal practice, to be considered as mere pretext seized to cl
discriminatory motive. Zerga was merely trying to keep two
employees from creating conflicts which were inhibiting the
productivity of both of them (Brief, page 6).

The issues raised by this contention have been previously
reviewed. In sum, the evidence does not establish that respon
transferred complainant Haro for legitimate business reasons b
to the contrary he was transferred for engaging in a protected
activity.

Respondent's contentions after
issuance of interim order

After the parties filed their stipulation concerning dama
the parties were granted an additional opportunity to file bri
Complainant Haro did not file. Respondent did. Respondent's
contentions all address the interim order that was entered
reaffirming the original discrimination concerning the B.O. ca
incident. The issues raised were in addition to those previou
raised and discussed when respondent filed its brief after the
order of remand and before the entry of the interim order.
Magma's contentions entitled "Exceptions to order after remand
are basically credibility arguments. They follow:

Contention No. 1:

The Order draws a negative inference in several places from the failure of Supervisor Cothern to testify. (e.g., p. 6 paragraph 3; p. 8 paragraph 5) Mine Superintendent, Bob Zerga, testified that Mr. Cothern was then employed by Freeport Mining Co., in West Irian, on the Island of Java, in Indonesia, and that he was not available to testify (Tr. 293). Further explanation of his failure to appear would seem superfluous.

(see Tr. 63-64), and his direct examination (Tr. 19).

In his complaint to MSHA, Haro goes into exquisite deta
concerning the personnel involved, their level assignme
and the conversations he had with each one. At no time
he mention that Stonehouse told him to call Torres.

In an attempt to destroy Haro's credibility on this poi
respondent initially cites Haro's complaint to MSHA "in the
Commission record."

Haro's statement to MSHA was not offered as an exhibit
did any party request the judge take official notice of such
statement. Accordingly, the statement is not part of the
evidenciary record and not before me.

Respondent further cites Haro's direct examination, cit
the transcript at pages 19, 63-64.

In order to analyze these points I deem it necessary to
forth the pertinent portions of the transcript.

The direct examination at pages 16-19 of the transcript
the following:

> A. Yes, sir. Mr. Tosca: Your Honor, this is a memo-
> randum of Magma Copper Company which directly relate
> to the questions I just asked. I offer it into evid
>
> (Whereupon the above mention
> Exhibit was marked for
> identification at this time
>
> Judge Morris: C-2 has been offered in evidence. It'
> memo from a J. Herndon. Any objection to C-2, Mr.
> Grimwood?
>
> Mr. Grimwood: Your Honor, no, there's no objection a

Judge Morris: Exhibit C-2 will be received together with the stipulation.

(Whereupon the above mentioned Exhibit was received into evidence at this time.)

By Mr. Tosca:

Q. Will you please read that short memorandum to the Court, please?

A. "May 8, 1976, Subject, Production Training Message. In the last 30 days there has been two instances of mud trains losing cars on the main line. From this day forward there will be no cutting of cars from the production train to service development or any other reason except to cut out a B.O. car.

When a B.O. car is cut, a supervisor will be present. The safety hooks and couplings are to inspected as often as necessary and cleaned if necessary."

Q. Well, according to your testimony, Mr. Haro, Mr. Lockhart apparently asked you to break company policy; is that right?

A. That's correct.

Q. Did you ask your supervisor?

A. I asked him that the policy be followed.

Judge Morris: You asked for what?

The Witness: I asked that the policy be followed.

By Mr. Tosca:

Q. You were aware of this memo at the time?

A. Yes, I was, sir.

Q. What was Mr. Lockhart's response to your request?

stated.

Q. Did you cut the ore car from the train?

A. No, sir.

Q. What was the result of that?

A. At that point in time, I called my immediate supervisor, Mr. Frank Torres at his home as I had bee told to do by Mr. Torres if I had run into this situation and at that point in time Mr. Torres explained over the telephone to myself and the shaft foreman, Mr. Stonehouse, the procedure as stated in the memorandum. (Emphasis added).

Then Mr. Torres called Mr. Lockhart and explained the procedure to Mr. Lockhart and I was never asked after that point in time to go out and cut the car.

Q. And that was the end of that issue?

A. At that point in time, sir.

Q. On June 14, 1978, were you working under a Mr. Cothern, a foreman for Magma Copper Company?

A. Yes, sir, Mr. Cothern was an assistant chief foreman.

Q. On that date did you have a conversation with Mr. Cothern regarding the tail light on the rear of one of these ore cars?

A. I did, sir, on two different occasions on the same date.

Q. Can you give me, in substance, a brief synopsis of that conversation?

A. Yes, sir, Mr. Cothern instructed me to tie with bailing wire, a light to the end of the production train and when I brought Mr. Cothern's attention to the policy stating that we did not tie lights on the end of trains, that we installed them on

Q. What was your response?

A. I told him, "No, sir, I wasn't."

Further relevant verbatim testimony appears in Haro's cross-examination:

Transcript at 61-64:

Q. And Mr. Lockhart was a dispatcher?

A. That's correct, sir.

Q. Was Mr. Lockhart in, well, he wasn't in that chair of command I just described was he?

A. Oh yes.

Q. Where does he fit in?

A. He is a dispatcher of supervisory personnel. I imagine he's probably the same pay rate as Mr. Stonehouse.

Q. Right, but at least as far as Mr. Stonehouse being your card signing boss, Mr. Stonehouse reporting t Mr. Cothern, he's not in there any place, but he c ask you to do something.

A. Yes, sir.

Q. Okay, so isn't it true that when Mr. Lockhart aske you to do that and you told him that you didn't wa to do it, it was against policy and you pointed ou that thing, isn't it true that you simply, at that time, went over to the telephone and called Mr. Torres? I believe that's what your testimony was. You immediately went and placed a call to Mr. Torr is that correct?

A. This is at the conclusion of three conversations I had with Mr. Lockhart in reference to cutting th B.O. car out.

A. Yes, sir.

Q. And then so you just went ahead and just got on phone and called up Mr. Torres at his home. He off shift at that time, right?

A. Sir, I believe my first complaint will show that went to the 2075 and I reported to Mr. Stonehous I told Mr. Stonehouse what the policy was. I to Mr. Stonehouse what the situation was at that po in time and I asked him for his suggestion.

Mr. Stonehouse indicated to me that he did not h any knowledge of such policy and that he himself commended that I call Mr. Torres as Mr. Torres t me to do if I ran into this situation. (Emphasis

Q. Okay, what I'm saying though, Mr. Haro, is that' the way you testified on direct examination and believe--

Mr. Tosca: I don't believe the question was asked w he had called Mr. Torres on direct or not. It wasn asked.

Judge Morris: Well, we don't have a full question h I believe, that's where it trailed off so you can h your objection for a minute.

Mr. Grimwood: Well, the record will reflect whether question was there or not.

Judge Morris: Well, you haven't asked him a questio Mr. Grimwood. How can he answer it? Do you want t him a question and if Mr. Tosca has an objection he make it, but right now there's no question.

By Mr. Grimwood:

Q. Okay, Mr. Haro, do you recall when I took your d position on July 18, 1980, about three weeks ago this matter, on these discrimination charges, do recall that?

train and to replace it with a good car. I asked Mr. Lockhart for assistance in this and he refused to comply with my request so I referred him to the memorandum and Mr. Lockhart asked me if I was refusi to do a job as was given to me. I informed Mr. Lockhart that I was not refusing to do a job, that was merely trying to comply with the memorandum poli as stated.

I, at that time, called Mr. Torres at home and infor Mr. Torres of the situation." Now is that pretty mu how it happened?

A. First of all, sir, during the deposition I tried to explain my answers as throughly as I possibly could. If I deleted the conversation that I had with Mr. Stonehouse prior to that, I didn't do it purposely.

It is on the record on my first complaint with MSHA and I did put that in. If you'd care to check those records, it's in writing.

Q. Well, there's been quite a bit of writing here. Wel okay, so at least you talked to Mr. Lockhart. Mr. Lockhart didn't give you satisfaction. Now you say you also talked to Mr. Stonehouse. Did you talk to Mr. Cothern about this situation?

A. Mr. Stonehouse indicated to me that Mr. Cothern and Mr. Corwin were not available.

Q. Well, were they on that shift?

A. They were, sir, but they were not in an area where they could be reached at.

Contrary to respondent's contentions I find Haro's testimo at Stonehouse suggested he call Torres to be very credible.

In his direct examination, Haro is explaining his telephon ll to Torres (Tr. 18, lines 8-14). At this point, without an ading question or suggestion, Torres, on the telephone, is ex aining the procedure to Haro "and the shaft foreman, Mr. Ston use." (Tr. 18, lines 12, 13).

(Tr. 63, 64), of "what happened on that date?" [June 13, 197
does not require a party to state every detail of the events
that day.

The concluding paragraph of respondent's argument again
refers to Haro's written complaint to MSHA. As previously s
that evidence is not before me.

For the foregoing reasons I conclude that Stonehouse in
suggested that Haro call Torres.

Contention No. 3:

Mr. Torres specifically instructed Mr. Haro and other
mechanics involved not cut B.O. cars by themselves. To
specific instructions were to contact him at home only
having contacted the shift foreman and the shaft boss o
and not having gotten satisfactory response from them (
102-103).

In support of its position respondent cites the transcr
pages 102, 103. This portion of the testimony is as follows

> Q. Okay, Mr. Torres, Mr. Haro has testified here tod
> about some problems he had with Mr. Cothern in the m
> operating division and that sort of thing. Do you g
> your mechanics, you said you had three or four of th
> who work on B and C shift, any special instructions
> about handling these kinds of problems that they mig
> run into with operating people?
>
> A. Yes, sir, let me explain this. On B and C shift
> there is no mechanical supervisor in this area where
> we work and they work, the dump mechanic works for t
> shaft foreman which the shaft foreman answers, in th
> particular case, to Mr. Cothern who was assistant sh
> foreman or shift foreman of this crew, and I have gi
> them instructions as to, if they asked, say for inst
> to cut a B.O. car off the train to if they ask them
> go cut it off to ask for assistance. To try, if the
> cannot get anywhere with the shaft boss, his immedia
> supervisor at that time, to ask to talk to the assis
> shift foreman or the shift foreman whichever the cas
> may be, to get some help to do the job of cutting of

Q. Well okay, I'll withdraw the question. You've testified that the mechanic who works on B and C shift does not have an immediate mechanical supervisor that moreorless is responsible to, that the mine operating division--in your opinion is it important to have someone with some degree of diplomacy or at least some common sense to work in this position, to work with the mine operating people?

A. Yes, sir, it's very important to cooperate, yes, sir.

Additional evidence on this point, not cited by respondent, rs in the direct testimony of Torres at page 93 of the cript. It follows:

Q. Do you know if--who was it you gave those instructions to?

A. Mr. Stonehouse at the time was the shaft foreman in that area on B shift or whatever shift that it is that we are talking about.

Q. To your knowledge, do you know if Mr. Stonehouse provided assistance to Mr. Haro to cut an ore car from the train?

A. I would assume he did, yes.

Q. But you have no personal knowledge whether he did or not?

A. No.

Q. When Mr. Haro called you at home on June 13, 1978, was he acting in accordance with your instructions?

A. Yes, he was. I tell this to each one of my dump mechanics. We have three or four of them that are on rotating shifts, that if for some reason they cannot work with the shaft foreman or the assistant shift boss in regard to cutting off cars, which ordinarily they

any question" (Tr. 93). There were in fact serious c
One of these was that Lockhart would not assign anoth
assist Haro (Tr. 15). In reply, Haro was asking that
company policy be enforced (Tr. 15, 16). Another que
from the fact that Stonehouse himself "wasn't aware o
policy" (Tr. 268). This may be the reason why Stoneh
the extension when Haro talked to Torres.

Contention No. 4:

Contrary to the language of the Order, the law o
that "[i]f a protected activity in part causes a
action against a miner then a violation of the A
The petitioner's proof in a "mixed motive" case
burden to the respondent to articulate a ligitim
business necessity for his action.

The law of the case has been clearly articulated
Commission in its order of remand, 4 FMSHRC 1935. Th
has directed the judge to analyze respondent's legiti
reasons. The analysis is made here, and for the reas
herein, I reject that defense.

Contention No. 5:

Mr. Haro was never "transferred", but he was re-
assigned (e.g., Tr. 298). Transfers are shown o
personnel card, assignments to crews or working
not.

The parties have agreed on the damages incurred
Whether the adverse action against Haro is called a "
or a "reassignment" is of little consequence.

Contention No. 6:

The fact that Mr. Haro was never told that he wa
in requesting assistance in cutting a B.O. car s
absence of respondent's animus toward a protecte
The irritation of Mr. Cothern arose out of Haro'
to telephone off the property without having con
Mr. Cothern as Mr. Torres told him to do. Haro'
mony that Stonehouse told him to make the call i

Contention No. 7:

Mr. Cothern was an operations supervisor. Mr. Torres was maintenance supervisor. Mr. Cothern can hardly be charge with knowledge of instructions given by supervisors in ot departments. Furthermore, Cothern's instructions were consistent with those given by Torres: contact the highes responsible person on the job before calling off the property.

I disagree with respondent's initial statement. A manage upervisor should have knowledge of a written company safety emorandum. Further, particularly in matters relating to safe e should know how unsupervised workers handle safety complain

The second statement in contention No. 7 has already beer iscussed.

Contention No. 8:

The Order confuses Haro's reassignment from dump mechanic maintenance mechanic (underground) to maintenance mechani (surface). Mr. Zerga granted Mr. Haro's request for the latter reassignment because of the Helmer accident.

The parties have stipulated on Haro's damages. No purpos an be served by exploring this issue.

After considering the record and for the reasons stated erein I conclude that complainant's claim of discrimination rising from the B.O. car incident should be affirmed.

Stipulation Concerning Damages

The parties, by their respective counsel, in a written tipulation agreed that if a final order finding unlawful iscrimination is to be issued an accurate computation of the mounts to which complainant would be entitled are as follows:

Back pay	$3,219.71
Interest	2,099.36
Attorney fees	5,644.52
Compromise of Special Damages	361.20

approved.

Based on the facts recited in this decision and on the conclusions of law herein I enter the following:

ORDER

1. Complainant's claim of discrimination concerning t railroad car is affirmed.

2. The employment record of William A. Haro is to be completely expunged of all comments and references involved refusal to remove and replace the B.O. railroad car.

3. Respondent is ordered to pay the following sum to complainant for the amounts indicated:

Back pay	$ 3,219.71
Interest	2,099.36
Attorney fees	5,644.52
Compromise of Special Damages	361.20
Total	$11,324.79

John J. Morris
Administrative Law Judge

Distribution:

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/blc

MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. YORK 79-99-M
	:	A.C. No.30-00013-05003
v.	:	
	:	South Bethlehem Quarry
LLANAN INDUSTRIES, INC., Respondent	:	and Mill

DECISION APPROVING SETTLEMENT

pearances: William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for Petitioner;
Harry R. Hayes, Esq., Hayes & Lapitina, Albany, New York, for Respondent.

fore: Judge Melick

This case is before me on remand for reconsideration of petition for assessment of civil penalty under Section 0(a) of the Federal Mine Safety and Health Act of 1977 he Act). Petitioner has filed a motion to approve a ttlement agreement as to the one remaining citation and to smiss the case. Respondent has agreed to pay the proposed nalty of $78 in full. I have considered the representaons and documentation in the case, and I conclude that the offered settlement is appropriate under the criteria set rth in Section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is ANTED, and it is ORDERED that Respondent pay a penalty of 8 within 30 days of this order.

Gary Melick
Assistant Chief Administrative Law Judge

stribution:

lliam G. Staton, Esq., Office of the Solicitor, U.S. partment of Labor, 1515 Broadway, New York, NY 10036

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. KENT 83-117 A. C. No. 15-06365-03504
v.	:	No. 1 Surface Mine
WEST VIRGINIA REBEL COAL COMPANY, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Steffey

Counsel for the Secretary of Labor filed on January 9, 1 in the above-entitled proceeding a motion to withdraw the pro sal for assessment of civil penalty and dismiss the proceedin or, in the alternative, a motion for approval of settlement. alternative motions are accompanied by data showing that resp ent paid in full the civil penalties totaling $120 proposed b MSHA for six alleged violations of the mandatory health and s ty standards. Respondent paid the proposed penalties by a ch dated March 31, 1983, which was just 17 days after the propos for assessment of civil penalty was filed on March 14, 1983.

There was apparently a lack of communication between the personnel who paid the proposed penalties and the personnel w are responsible for the filing of answers to proposals for as ment of civil penalty because respondent failed to file an an to the proposal for assessment of civil penalty until after t Chief Administrative Law Judge had issued a show-cause order June 20, 1983, requiring respondent to file an answer or be h in default and be ordered to pay the penalties proposed by MS Respondent filed on July 1, 1983, an answer in reply to the s cause order. The answer denies that any violations occurred requests that a hearing be held "on all said matters".

The Secretary's motion cites the Commission's decision i Mettiki Coal Corp., 3 FMSHRC 2277 (1981), in support of his r quest for permission to withdraw the proposal for assessment

resolution of the matter pending would best be served by the Co
mission's settlement procedures or by an evidentiary hearing.
This situation is not presented in this case" (3 FMSHRC at 2277)

It does not appear that the Commission's settlement procedu
would best serve the resolution of the issues in this proceedin
either when it is considered that respondent paid in full the to
penalties proposed by MSHA just 17 days after the proposal for
assessment of civil penalty was filed. The Secretary's counsel
commendably filed his motion in the alternative and provided amp
reasons in support of his alternative motion for approval of set
ment if I had found that approval of the parties' settlement agr
ment would provide the best method for resolution of the issues
this proceeding. Another reason for granting the motion to with
draw, instead of granting the alternative motion for approval of
settlement, is that MSHA has already received the check for full
payment of the proposed penalties so that there is no need for m
to issue an order requiring respondent to pay the penalties pro-
posed by MSHA.

In the circumstances described above, I find that the Secre
tary's motion for permission to withdraw the proposal for assess
ment of civil penalty should be granted.

WHEREFORE, it is ordered:

The motion for withdrawal of the proposal for assessment of
civil penalty is granted, the proposal for assessment of civil
penalty is deemed to have been withdrawn, and all further proce
ings in Docket No. KENT 83-117 are dismissed.

Richard C. Steffey
Richard C. Steffey
Administrative Law Judge

Distribution:

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Departme
of Labor, Room 280, U. S. Courthouse, 801 Broadway, Nashville,
37203 (Certified Mail)

ALBERT B. ZEISEL, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 83-9-DM
v.	:	
	:	MD 82-80
ASARCO, INC., Respondent	:	

DECISION

Appearances: Ronald E. Gregson, Esq., Denver, Colorado, for Complainant;
Earl K. Madsen, Esq., Bradley, Campbell & Golden, Colorado, for Respondent.

Before: Judge Carlson

This case arose upon a complaint of discriminatory dis filed by the complainant with the Secretary of Labor under 105(c)(2) of the Federal Mine Safety and Health Act of 1977 U.S.C. § 801, et seq., (the Act). The Secretary, after inv gation, declined to prosecute the complaint. The complaina Albert B. Zeisel, then brought this proceeding directly bef this Commission as permitted under section 105(c)(3) of the

Mr. Zeisel alleges that he was discharged in violation section 105(c)(1) of the Act. 1/ The essence of his compla

---

1/ Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate or cause to be discharged or cause discrimination against o wise interfere with the exercise of the statutory rights of miner, representative of miners or applicant for employment coal or other mine subject to this Act because such miner, sentative of miners or applicant for employment has filed o a complaint under or related to this Act, including a compl notifying the operator or the operator's agent, or the repr tive of miners at the coal or other mine of an alleged dang safety or health violation in a coal or other mine, or beca

Mr. Zeisel's original complaint, filed pro se, indicated he had been compelled to use a jack which was not working properly, but the pleading contained no direct allegation tha had made a safety complaint to the operator. Thereafter, Mr. Zeisel secured counsel who at a formal pretrial hearing was permitted to amend the complaint by adding the following allegation:

> [D]uring the incident that led to the second warning notice the Complainant made a complaint directly to Mike Mosher, his shift boss, concerning the safety of the jack ... which he was using. (Prehearing transcr at 4 and 5).

A full hearing on the merits was held in Denver, Colorad following which both parties submitted extensive briefs.

REVIEW OF THE EVIDENCE

There was little agreement between the parties as to most the facts concerning complainant's firing. The undisputed evidence does show that Mr. Zeisel had worked in the operator underground metal mine at Leadville, Colorado from September to his discharge on or about May 25, 1982. At the times mate here, he was a motorman's helper. In that capacity he worked successively, under three shift bosses: Dennis Vetrano, Glen Anderson, and Mike Moshcr. On October 5, 1981, he received a warning notice from Vetrano (complainant's exhibit A). The no specifies that he failed to follow orders and performed unsatisfactory work. Although the "explanation" portion of th notice simply notes "employee not doing job correctly," there general agreement that Vetrano was dissatisfied with the speed with which Zeisel and fellow crewman were mucking a ditch.

The witnesses also agreed that a second warning was issue this time by Mosher, on April 29, 1982, (respondent's exhibit but there was disagreement about the particulars of the incide

The parties did agree as to the nature of the event which Mosher to issue a third and final notice on May 25, 1982. Thi event involved Zeisel's use of his finger to hold a latch on a hand-operated track jack which he and his motorman were using

ccording to his testimony, at the very time that Mosher was
eprimanding him for using his finger to hold the malfunction
atch. Beyond that, Zeisel testified that he had a reputatio
safe and effective worker, and that Mike Mosher had evidenc
islike for him from the first day he reported for work on
osher's crew. Finally, Zeisel maintained that Robert Russel
he mine superintendent, resented him because he had purchase
ouse from ASARCO which had been the house of Russell's boss,
nit manager.

Witnesses for ASARCO testified that the complainant was
ischarged because he had repeatedly engaged in unsafe practi
nd was not an effective worker. They also maintained that t
iring occurred after a series of incidents for which formal
arnings were given in accordance with established disciplina
rocedures.

In resolving the evidentiary disagreements some review o
estimony relating to each incident is necessary. Mr. Zeisel
cknowledged that his first shift boss, Vetrano, for whom he
orked about three months, had once criticized him for failin
uck a ditch far enough or deep enough. Zeisel indicated tha
ever saw a written notice, nor signed one. The evidence doe
ndicate, however, that Vetrano filed one with management on
ctober 5, 1981 on which he checked boxes marked "failure to
ollow orders" and "unsatisfactory work", and upon which he a
rote "Employee not doing job correctly." (Complainant's exhi
.)

Zeisel testified that he received another warning notice
llegedly mishandling a section of rail which he and motorman
unn were lifting. According to Zeisel, Dunn's hand slipped
e dropped the rail. Zeisel asserted that he got a warning s
rom his then shift boss, Mike Mosher, although Dunn himself

nsafe." Eversole testified that he was asked by Mosher at his time how to spell Zeisel's name because he was ng about" giving Zeisel a warning slip because Zeisel had ind of unsafe." Mosher mentioned the dropped rail incident connection. According to Eversole, Mosher also mentioned isel "was not totally responsive as a helper." Mike Dunn, lled as witness for ASARCO, testified that he had ned to Mosher that Zeisel had let go of the rail, which led 's finger being "smashed," and that he may have told Mosher isel had jumped between moving cars on the track. Dunn ed that he asked Mosher that Zeisel be taken off the crew.

sher himself, in testifying for ASARCO, indicated that Dunn ed him to transfer Zeisel because he was "too unsafe." said Dunn had told him of Zeisel's standing on the track ignaling Dunn to back up the motor. According to Mosher, il 4, 1982 reprimand was for Zeisel's unsafe signaling e as reported by Dunn, not the dropped rail incident, which not believe "serious." Mosher testified that he moved Dunn fferent crew because of his safety complaints about Zeisel ript 207).

e crucial incident is that involving Zeisel's use of the That episode triggered Zeisel's discharge and furnishes the or his complaint in this proceeding. The undisputed e shows that the track jacks used to replace derailed cars track sometimes malfunction because particles of muck or jam the latch mechanism which has to be pushed to allow the be raised. When this occurred it was common for one miner a wrench (a buzzy) to depress the latch while another d the handle which raised or lowered the jack. On or about 1982 Zeisel was working as helper for motorman Robush when lment took place. The two men used a jack to get the d cars back on the track. No one disputes that Zeisel used ger, rather than a buzzy, to hold the jammed latch on the nd that Mosher saw him do it.

Robush and Zeisel agreed that they alternated holding th
atch and operating the iron bar used on the jack handle. Ze
nsisted that he used his finger because neither man had a hu
o use instead. Robush contradicted this, claiming that he h
uzzy which he used, and which he offered to Zeisel. Accordi
obush, Zeisel used it for a while, but then used his finger,
nich he was doing when Mosher happened on the scene for a se
ime. The first time when Mosher came by, Robush asserted, h
imself was holding the latch with his buzzy. Robush claimed
e had warned Zeisel not use his finger and was ignored. Zei
enied that Robush said anything.

They agreed, however, that Mosher reprimanded Zeisel on
pot. Robush testified that Mosher warned that if the jack
lipped it could cut off a finger. He also testified that he
osher the jack was not working properly, to which Mosher rep
nat the jack should be "bad ordered" and sent to the surface
epair. Zeisel agreed that Mosher warned him about using his
inger, but denied that Robush told Mosher anything or that M
ad ordered" the jack.

The testimony differs as to what, if anything, Zeisel sa
osher that could be considered a safety complaint. Zeisel's
estimony on this matter was not wholly clear. Early in his
irect testimony, this colloquy occurred:

> Q. Was it dangerous to use your finger?
>
> A. Not at all. I mean, you either use a buzzy or you use your finger in order to get that jack to work properly if its not working at all. (Tr. 20.

hen following this testimony:

> Q. What did you say to Mike Mosher when he said it was unsafe?
>
> A. I said it wasn't unsafe, that the whole jack or the jack itself was not working properly and that it just wouldn't -- thats all we had to work with

xxx

Q. You told him [Mosher] the jack was not working properly and what you were doing was really not unsafe?

A. Pushing it in, no. To my knowledge it isn't because its common practice. So I told him the jack was not working properly and this was how we had to to make it work. [Emphasis added]

Q. Did you say anything else to him?

A. Basically that was it. Just talking about the jack, just saying it wasn't working. And he just walked off. (Tr. 44).

later in the cross examination Zeisel insisted he told r, specifically, the jack "was unsafe, it wasn't working " (Tr. 46).

Under further cross examination, after being asked to review affidavit given to an MSHA investigator, he appeared to at from that position:

A. Yeah, I told him the jack wasn't working properly.

Q. But there is no reference to your using the term safe or unsafe or safety?

A. Well, they go together if its not working properly.

Q. Thats in your opinion.

A. Its a fact, it seems like.

Q. But you didn't say that.

A. No, but if its not working properly .... (Tr. 49.)

Upon examination by the judge, complainant became more cit:

A. Well, its easier to use, yes sir.

Q. Is that the only reason you use it, 'cause its easier to use than your finger?

A. It would be, yeah.

Q. Not because its safer to use than your finger?

A. No. Using your finger could not get you hurt. (Emphasis added.) (Tr. 71-72).

Robush, who was called as a witness by complainant, agree
hat Zeisel did complain about the jack to Mosher after being
rned by Mosher about using his finger. Robush testified as
llows:

Q. What, if anything, did Mr. Zeisel say to Mr. Moshe that you heard?

A. He told him that we had trouble with the jack from the very beginning.

Q. Anything else?

A. No. (Tr. 111).

Robush reiterated this recollection under questioning by
dge:

Q. I want you to think before you answer this questic Did Mr. Zeisel say anything to you or Mr. Mosher about the safety or lack of safety or anything concerning danger relative to the use of the jack? Did that subject come up in his conversation?

A. No, I don't believe so. (Tr. 122-123).

ow worker," and that other workers were "carrying some of his
ght." The essence of Johnson's testimony was that complainan
discharged out of belief that the miner displayed unsafe wor
its (although he had never had an accident), and for a genera
lure to perform his job properly. Johnson claimed to have no
wledge of any alleged safety complaint before the firing (Tr.
).

Russell's testimony was in essential agreement with that of
nson. He, too, denied any knowledge that Zeisel had made any
t of safety complaint about the jack (Tr. 228). In this
ard, Russell indicated that he had discussed the two most
ent warning slips with Ray Bond, the mine foreman, who in tur
talked to Mosher. Bond made no mention of any safety
plaint from Zeisel.

Management's witnesses also suggested that the complainant'
charge was the natural consequence of his having received thr
mal warnings for work violations. Personnel records of other
charged miners were produced in an attempt to show that
sel's termination was consistent with an established company
icy of discharge for cumulative warnings for on-the-job
conduct.

Management officials did not contend that the company had a
cific rule forbidding using fingers on a sticking latch.

Basically, they contended that common sense barred such a
ctice. Further, unit manager Johnson believed that the
ctice was covered by a general provision in the company's
ety rule book distributed to all employees. Rule 3 on page 1
the book provides:

> No set of rules can more than outline a few safety procedures. Plan your work and do your work in conformity with these rules, but use good judgment. This book must be supplemented by common sense. (Respondent's exhibit 7 at 1).

All witnesses except Zeisel appeared to share a belief that
of a finger to depress a sticking latch was dangerous.

(1980) rev'd on other grounds sub nom. Consolidation Coal C Marshall, 663 F. 2d 1211 (3rd Cir. 1981). In Pasula the Commission held that complainant must carry the initial burd showing that he engaged in a protected activity and that the protected activity was a motivating factor in his discharge some other discriminatory act.

Having carefully considered all the evidence and the arguments of the parties, I must conclude that the complaina this proceeding failed to establish the initial element. No for protected activity can be made out unless the complainin miner makes known his complaint to the mine operator. Put a way, an operator can scarcely be said to have discharged a m for making a safety complaint it knew nothing about. In Dun v. Northern Coal Co., 4 FMSHRC 126 (1982), the Commission considered the minimum requirements of a health or safety complaint in connection with a work refusal. The resulting holding made clear that a communication is "ordinarily" esse Exception may be found where no representative of the operat present, where "exigent circumstance require swift reaction, where an attempt to communicate would be futile. The Commis amplified this concept as follows:

> We stress that our purpose is promoting safety, and will evaluate communication issues in a common sense not legalistic manner. Simple brief communication w suffice, and the "communication" can involve speech, action, gesture, or tying in with others' comments. are confident that the vast majority of miners are responsible and will communicate such concerns in an event. (Id. at 134.)

Complainant, of course, was not involved in a refusal t work. On the contrary, assuming that he did in fact feel th unsafe, he nevertheless proceeded to join Robush in its use. complaint, if he made one, came only after he had been verba reprimanded for using his finger on the latch. This does no mean, however, that he could not have voiced a perfectly val complaint at the time of the reprimand. The most favorable of his testimony is that in which he maintained that he told shift boss that the jack was "unsafe." One can conceive of situation where a miner, fearful for his livelihood and havi already received two warning slips, might indulge in an unsa where he believed he was expected to do so in conformity wit

operator. These two were the only miners whom Zeisel osedly saw using their fingers. More important, the lainant, when closely examined on the matter, ultimately owledged that he recognized no safety problem in using his er on the latch, and that his only statement to Mosher was the jack "was not working properly." Ignoring Mosher's own imony that Zeisel said nothing about the condition of the , and indeed did not speak at all, I must agree with the ator that a statement that the jack "was not working erly," if made, did not rise to the level of a cognizable ty complaint. I specifically reject complainant's argument such words carried with them a reasonable connotation that speaker was concerned about the safety of the jack. It is fa likely that Mosher, or any reasonable person, upon hearing words, would have assumed that they were offered as a spur- ne-moment excuse or justification for the miner's own breach afety principles, not as a complaint of an unsafe condition rent in a jack with a stuck latch.

In reaching this conclusion, I have not ignored the attempts omplainant's counsel, in his excellent brief, to place his nt within the exceptions to the necessity for an explicit laint as outlined in Dunmire. The facts simply do not fit e exceptions. A management representative was present and lainant had a clear opportunity to register a complaint. I no credible evidence that Zeisel believed that the making of mplaint would have been futile or useless. On the contrary, he hearing he maintained that he did make a complaint by aring that the jack was not working properly.

Although I am convinced that Mr. Zeisel made no safety- ted complaint, I should add that the credible evidence also nstrates that no such complaints ever reached the unit manage nson) or the mine superintendent (Russell), who together made decision to terminate the complainant's employment. Thus, if el did declare to Mosher that the jack was not working and er managed to construe this to mean that Zeisel had a concern the safety of the device, there is no indication that Mosher communicated any of this to any higher management official, alone to those who made the decision to fire.

Complainant seeks to show a management awareness of a laint through the following testimony by mine superintendent

estimony, it stands for nothing more than a reflection of
anagement's dismay over a miner's use of his finger on the l
echanism. I should note that I find that the company's conc
ver the use of a finger on the jack was genuine. I also fin
hat the practice was in fact hazardous.

Some mention should also be made of the significance of
oss Mosher's "bad ordering" of the jack when he was told tha
asn't working properly. Complainant suggests that this acti
hould be construed as an admission that using a jack with a
ammed latch was unsafe per se. (Curiously, Zeisel himself d
hat Mosher issued a "bad order" (Tr. 22)). The question thu
aised is whether ASARCO recognized that a jack with a jammed
atch was dangerous even when used with a buzzy.

Mosher maintained that it was ordinarily safe to use a b
e pointed out that the car was already raised when he got th
nd that he had no recourse but to allow the miners to finish
cknowledged, however, that because of the location of the ca
he incident in question, some possibility existed that a min
ould be hurt even if using a buzzy, had the jack slipped. (
12-213). Superintendent Russell, on the other hand, testifi
o the general effect that use of the buzzy was an acceptable
echnique. Demonstrating with a jack, he endeavored to show
ars needed to be raised but a small distance to replace them
he track, and that if the jack slipped the car always fell t
ide or the other, not toward the end where the jacking was d
e ultimately acknowledged, however, that it was safer to use
ack in good working order, than to use anything to hold the
atch. (Tr. 217-219, 244-245.) On the whole, however, it is
pparent that miners and management alike tended to believe u
buzzy was acceptable and generally safe; otherwise the
ranscript would not be filled with unquestioning references
he use of buzzy on sticking latches. Use of a buzzy, that i
ay, was not perceived as cheating on safety. In a mine wher
hat state of mind prevailed it is doubtful that a suggestion
he jack was "not working properly" would be seen as a safety
omplaint. This is especially true where the suggestion came
miner who - seemingly alone among mine personnel - believed
as safe to use his finger directly on the latch.

ischarge must be discounted because the surrounding circumsta
uggest that those reasons were a mere pretext for a retaliato
ismissal based on his making of a safety complaint. In suppo
f this contention, complainant relies on Chacon v. Phelps Doo
orporation, 3 FMSHRC 2508 (1981), rev'd on other grounds, 709
d 86 (D.C. Cir. 1983). That case recognized that operators w
re motivated to retaliate against miners for engaging in
rotected activity seldom leave a trail of direct evidence. T
he real motive for an adverse action may be proved by reasona
nferences drawn from such circumstances such as these: the
perator's knowledge of protected activity; its hostility to t
rotected activity; a coincidence in time between the protecte
ctivity and the adverse action; and disparate treatment of th
omplaining miner and others whose alleged non-protected condu
as similar. Complainant insists that the evidence here manda
n inquiry into the areas outlined in Chacon. His brief then
ffers an extended analysis of evidence claimed favorable to t
esired inferences.

The difficulty with complainant's position is manifest.
hacon approach is of value only when some evidence, direct or
ircumstantial, establishes that protected activity took place
f such evidence is lacking, any Chacon analysis ends there.
he reasons previously discussed, I found that no credible
vidence demonstrates that the miner conveyed to ASARCO any
nformation, by word or conduct, which was or should have beer
derstood as a safety complaint.

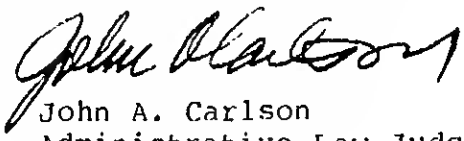
Some passing mention must also be made of complainant's
ssertion that he was the victim of an inexplicable animosity
he part of Mosher, who allegedly disliked him from the first
reported to work under Mosher's supervision. Mosher denied
uch attitude, and denied that he greeted complainant with
bscenities on his first day on the crew. If Zeisel is believ
owever, it adds no strength to his case. The complainant has
emedy under the Act only to the extent that his discharge was
otivated by a complaint about safety. If Mosher indeed harbo
unjustified dislike of Ziesel, that fact may have furnished
scharge motive quite remote from any alleged safety complain

Similarily, if we are to accept complainant's view that m
perintendent Russell was somehow biased against him because
rchased a house from a unit manager for ASARCO, that fact, t
uld at best furnish a separate motive for discharge.

herwise unsatisfactory worker. I consequently conclude that th
ner did not engage in protected activity under the Mine Safety
d Health Act of 1977 and is therefore without a remedy under th
t.

ORDER

In accordance with the foregoing, this discrimination
oceeding is ORDERED dismissed with prejudice.



John A. Carlson
Administrative Law Judge

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ARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
SAFETY AND HEALTH	:	
NISTRATION (MSHA),	:	Docket No. PENN 82-305
Petitioner	:	A.C. No. 36-05018-03501
v.	:	
	:	Cumberland Mine
STEEL MINING CO., INC.,	:	
Respondent	:	
	:	
MINE WORKERS OF	:	
ICA (UMWA),	:	
Intervenor	:	

DECISION

ances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petitioner;
Louise Q. Symons, Esq., United States Steel Corporation, Pittsburgh, Pennsylvania, for Respondent.

: Judge Melick

his case is before me upon the Petition for Civil Penalty by the Secretary pursuant to Section 105(d) of the Federal afety and Health Act of 1977, 30 U.S.C. § 801, et. seq., ct," for four violations of regulatory standards. The gen- ssues before me are whether U.S. Steel Mining Company, Inc. Steel), has violated the regulations as alleged and if so r those violations are "significant and substantial" within aning of the Act and as interpreted by the Commission in ary v. Cement Division, National Gypsum Company, 3 FMSHRC 981). If violations are found, it will also be necessary ermine the appropriate penalty to be assessed.

itation No. 1146090 charges a violation of the standard at

the construction and design requirements set forth in the dard at 30 C.F.R. § 18.44(c). Even assuming, arguendo, th those construction and design requirements are a prerequis permissibility, I do not find a violation herein. § 18.44 requires only that "battery-box covers shall be provided w means for securing them in an enclosed position." Admitte battery box covers in this case were equipped with tabs an which clearly provided a means for securing those covers i closed position. In addition to the tabs and holes, the c were interlocking and were provided with lips that fit ove edge of the battery box.

Since the battery box covers in this case fully compo with the requirements of § 18.44(c), I cannot find that a tion has occurred. Citation No. 1146090 is accordingly va If the Secretary indeed deems that battery box covers shou locked and secured at certain times for certain specified reasons, rulemaking procedures should be employed to provi appropriate regulatory standard. The Administrative Law J cannot be used as a substitute for such rulemaking.

Citation 1146093 charges a violation of the standard C.F.R. § 75.606 and specifically alleges as follows: "The uous miner trailing cable was under the left front tire of parked Torkar shuttle car serial No. 4275 in the east main tion [and] therefore was not adequately protected from dam mobile equipment." The cited standard requires that "trai cables be adequately protected to prevent damage by mobile ment."

It is not disputed that the conditions cited by MSHA tor Clarence Moats in fact existed. The trailing cable fo continuous miner was in fact found under the left front ti the cited shuttle car. Moreover there is no dispute that ing cables can be damaged if run over by heavy mining equi The cable in this case had not been blocked or moved out o roadway to protect it from being run over. In fact the ca been lying in the roadway three feet from the left rib. U

ircumstances, it is clear that the violation has been proven
arged. The evidence also shows however that the ground be-
the cable was soft, that the cable was not in fact damaged,
hat there was no power in the cable at the time it was cited.
ver it is undisputed that even if there had been internal
e to the cable, the circuit breaker would most likely have
ff power before injuries would occur.

A violation is "significant and substantial" if, "based on
articular facts surrounding that violation, there exists a
nable likelihood that the hazard contributed to will result
injury or an illness of a reasonably serious nature." Na-
l Gypsum, supra. The evidence shows herein that the hazard
ibuted to by damaging trailing cables is electrical shock
lectrocution. It is not disputed that these may lead to
ies which are reasonably serious. The evidence further
that such electrical shock could occur if the cable is
ed in such a way that exposed wire would protrude outside
nsulation and a miner picked it up with his hands. It is
n for the cables to be moved by hand. Although the wire in
ase was not found in such a condition, I find a reasonable
hood that if the cited condition remained uncorrected, the
would become exposed in the described manner and would re-
n an injury of a reasonably serious nature. Under the cir-
nces I conclude that the violation was "significant and
ntial" and constituted a serious hazard. Secretary v. Ma-
Coal Co., 6 FMSHRC _____ (January 6, 1984). I observe
he operator had three previous similar violations and anoth-
ilar violation the same day. This pattern shows a careless
ard on the part of management in preventing violations of
ature. Accordingly, I also find the operator to have been
ent. The violation was abated in a timely manner.

itation No. 1146094 was issued five minutes after the above
on for another violation of the same standard, i.e. 30
§ 75.606. In this case, the shuttle car located in the
ntry of the east main section was parked on top of its own
ng cable. The unchallenged evidence shows that the trail-
ble was lying beneath the left rear tire of the shuttle car
imately five feet from the rib. The cable had not been
ed to keep it out of the roadway and protect it from being
er. The remaining facts are the same as existed in connec-
ith the previous citation, noted above. Under the circum-
s, I find that the violation has been proven as charged. I
find that the violation was "significant and substantial"

nvironment of designated occupation 044 for MSHA's 0.9 was 2.7
illigrams per cubic meter exceeding the dust standard of 2.0
illigrams per cubic meter for this work unit."

The cited standard reads as follows: "Each operator shal
ontinuously maintain the average concentration of respirable
ust in the mine atmosphere during each shift to which each m
n the active workings of each mine is exposed at or below 2.0
illigrams of respirable dust per cubic meter of air as measu
ith an approved sampling device and in terms of an equivalent
oncentration determined in accordance with § 70.206 (Approve
ampling devices; equivalent concentrations)." Respondent doe
ot dispute the existence of the violation as charged but cla
hat the violation was not "significant and substantial" with
he meaning of the National Gypsum decision.

The evidence shows that the respirable dust samples were
aken from the longwall tailgate operators as required by MSH
he sampling device is placed upon the miners in this occupat
ecause it is expected that they will be the ones exposed to
ighest concentrations of respirable dust. The Secretary arg
hat based upon the British studies in evidence (Ex. P-1), an
he testimony of Thomas K. Hodous, M.D., a Board-certified ex
n internal and pulmonary medicine (Ex.P-2), nearly 1% of the
iners exposed over a 35 year working period to an average co
ration of 2.4 milligrams per cubic meter of respirable dust
evelop Category 2/1 simple pneumoconiosis or greater if they
egun working with normal Category 0/0 X-rays.[1]

It is not disputed that pneumoconiosis is a disease of a
easonably serious nature. The issue as presented is whether
ased upon the particular facts surrounding this violation th

The International Labor Organization classifies X-ray eviden
f simple pneumoconiosis based on the profusion of dots appea
n the lung films. There are four major categories from 0 to
ach further subdivided into three categores, 0 to 2. Catego
ould be a normal film and Category 3 would indicate a high p
ion of dots suggestive of a severe disease process.

nc., 5 FMSHRC _____, Docket No. WEVA 83-31 (January 30, 1984)
ound on the particular facts of that case that such a reasona
ikelihood existed. In that case, five respirable dust sample
aken on three consecutive days in the cited bimonthly samplin
ycle from the longwall tailgate operators showed an average e
are of 3.6 milligrams of respirable dust per cubic meter. Ba
the same British studies cited in this case, Dr. Hodous pro
ected that up to 2.4 per cent of miners starting with normal
ategory 0/0 X-rays exposed over a 35 year working period to t
oncentration of respirable dust would develop Category 2/1 or
reater pneumoconiosis. The evidence in that case also showed
hat from the 197 samples taken from that occupation over a pe
d of three and one half years, there was an average concentra
on of respirable dust of 3.12 milligrams per cubic meter. I
ddition, in that case the cited longwall unit had been consis
ently unable to meet the 2.0 milligram per cubic meter standa
uring its entire history of operation. It was considered to
echnologically infeasible to operate that unit consistently w
compliance of the standard. There was moreover insufficien
idence in that case to show whether the high risk tailgate o
ors were regularly wearing personal protective equipment whi
ould have reduced their actual exposure to respirable dust.

The evidence in this case shows that the Cumberland Mine
egan its longwall operations in February 1980. During 1980,
e 118 valid samples taken from the cited occupation, the lon
ll tailgate operator, the average concentration of respirabl
st was 1.828 milligrams per cubic meter. The mine operator
violation of the cited standard only once during the year.
enty-nine valid samples taken in 1981 showed an average resp
le dust concentration of 1.605 milligrams per cubic meter.
82, there were forty valid samples taken with an average con
ation of 2.02 milligrams per cubic meter. The mine operator
s apparently out of compliance with the standard once that
ar. To the date of hearing in 1983, ten samples had been ta
owing an average concentration of respirable dust of only 1.
lligrams per cubic meter.

According to longwall miner Gregory King, called as the S
tary's witness, the high risk occupations at the longwall
hose exposed to the highest concentrations of respirable dus
mely the headgate and tailgate operators) customarily wore p
nal respiratory protection (either Airstream helmets or Dust
8 respirators) about 20% of the time and usually during peri

The evidence in this case thus shows that the longwall gate operators at the Cumberland Mine have in the past only ly been exposed to respirable dust concentrations above the milligram per cubic meter standard. There is also a clear at the mine of progressively decreasing concentrations of r able dust as new dust suppression measures have been taken. violations of the dust standard have been found since 1982 the average concentration of respirable dust since then has below the proscribed level. It may therefore reasonably be red that the longwall tailgate operators will continue to b posed to dust concentrations below the proscribed level and they will continue to use respirators at least part time. this framework, I find that the assumptions necessary to th determination made by Dr. Hodous and based upon the cited B studies cannot reasonably be inferred in this case.

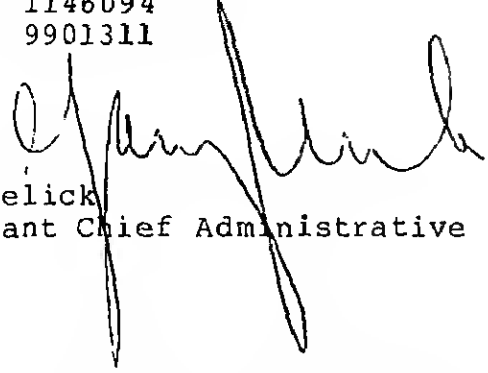
Accordingly, on the facts of this particular case, I d find that the cited violation is "significant and substanti nor of high gravity. Inasmuch as the Respondent had been, to the issuance of the citation at bar, operating its longw unit generally in compliance with the 2.0 milligrams per cu meter standard and followed no independent testing procedur do not find it was negligent in exceeding the prescribed du levels in this instance.

In determining the appropriate penalties to be assesse this case, I am also considering the evidence that the oper has continued to cooperate with the Bureau of Mines in deve new dust control techniques at its Cumberland Mine, that it furnished personal protective equipment to each of its mini crews, and has since the date of this violation, maintained tively low respirable dust levels. I also note that the op is large in size and has a moderate history of violations.

ORDER

The U.S. Steel Mining Company, Inc., is hereby ordered pay the following civil penalties within 30 days of the dat this decision:

Citation No. 1146094 125
Citation No. 9901311 75



Gary Melick
Assistant Chief Administrative Law Judge

tribution:

ard K. Agran, Esq., Office of the Solicitor, U.S. Department
Labor, 3535 Market Street, Philadelphia, PA 19104 (Certifie
l)

ise Q. Symons, Esq., United States Steel Corporation 600 Gran
eet, Pittsburgh, PA 15230 (Certified Mail)

nur E. Guty, Sr., Chairman, Safety Committee, Local 2300, Uni
Mine Workers of America, 341 Derrick Avenue, Uniontown, PA
01 (Certified Mail)

v.	:	Crestmore Mine
	:	
ROBERT A. RIEDMAN, Respondent	:	

DECISION

Appearances: J. Philip Smith, Esq., Office of the Sol
U.S. Department of Labor, Arlington, Vir
for Petitioner;
Enos C. Reid, Esq., Reid, Babbage & Coil
Riverside, California,
for Respondent.

Before: Judge Vail

STATEMENT OF THE CASE

In this proceeding, the Secretary seeks a civil penal against respondent, Robert A. Riedman, (Riedman), for viol section 110(c) of the Federal Mine Safety and Health Act o 30 U.S.C. § 801 et seq. 1/

Riedman, as mine production supervisor of the Crestmo for the Riverside Cement Company, Riverside, California, i alleged to have "knowingly authorized, ordered, or carried the alleged violation of 30 C.F.R. § 57.15-5 cited in MSHA withdrawal order No. 375785 issued November 1, 1979 pursua section 107(a) of the Act. The cited regulation requires safety belts and lines shall be worn when men work where t danger of falling; and a second person shall tend the life when bins, tanks, or other dangerous areas are entered. T

1/ Whenever a corporate operator violates a mandatory hea safety standard ... , any director, officer, or agent of s corporation who knowingly authorized, ordered, or carried such violation ... shall be subject to the same civil pena fines, ... that may be imposed upon a person under subsect 'a) and (d).

from above came down covering the employee. Safety belts, lines and a person in attendance on the line were not being used in this dangerous location.

Riedman denied the allegation. After notice to the par a hearing on the merits was held in Riverside, California.

FINDINGS OF FACT

1. On November 1, 1979, Riverside Cement Company was t corporate operator of the Crestmore Mine near Riverside, California. Robert A. Riedman was the mine production forem

2. Both Riverside Cement Company and Riedman are subje the Federal Mine Safety and Health Act of 1977 (Transcript a and 6).

3. The Crestmore Mine is an underground mine whose pri product is limestone for cement.

4. Riverside Cement Company paid a penalty assessment $5,000 for the violation of C.F.R. § 57.15-5 alleged in with order No. 375785, issued November 1, 1979 (Exhs. P-3 and P-7

5. The violation alleged in order No. 375785 was abate promptly and in good faith by the corporate operator (Exhs. and 6B).

6. On October 30, 1979, Richard Trombi, crusher operat was injured while trying to free bridged material in the feed hopper at the dynapactor crusher. The crusher is a part of underground mining process. Ore is hauled by trucks to where crusher is located and dumped into a hopper. A pan feeder i bottom of the hopper feeds the material into the dynapactor crusher (Tr. at 26-27 and Exh. P-5).

7. The hopper is a cone shaped bin, approximately 5 by feet wide at the top, 20 feet deep, and narrowing to 5 by 11 t the bottom. Material unloaded in the hopper sometimes bec lodged in the hopper and will not drop onto the pan feeder at bottom (Exhs. P-5 and R-1).

8. On the day of the accident, Trombi and Cliff Palmer climbed into the hopper with two sticks of dynamite intending set it off to dislodge some material that had become bridged

10. Trombi suffered back injuries, cuts to his nose mouth, and abrasions over other parts of his body (Tr. a

11. At the time the accident occurred, Riedman, the operator's agent and mine production foreman, was standi catwalk along the side of the hopper. Riedman was super work of Trombi and Palmer in the hopper (Tr. at 56-57 an R-1).

12. Riedman earns an annual salary of $34,000 (Tr.

ISSUES

1. On October 30, 1979, did the corporate operator provide and require its employees to wear safety belts a when entering the hopper; or have a second person tend t line in violation of § 57.15-5 as alleged in the withdra order?

2. If so, did Riedman knowingly authorize, order, out such violation within the meaning of section 110(c) Act?

DISCUSSION

The facts in this case are not in dispute. Richard and Cliff Palmer, employees of the corporate operator, u direct supervision of respondent Robert A. Riedman, climb hopper bin to blast loose rock that had become bridged a bottom of the bin and prevented the remaining rock from into the crusher.

In this case, rock had become bridged across the bo the bin and piled up along the side. Trombi and Palmer into the bin and stood upon some of the rock located app half way down the side of the bin. They intended to use to blast loose the bridged rock. Trombi had just bent o place the dynamite in the rock when the rock broke loose Trombi to fall to the bottom of the bin and other rock a down on top of him. Palmer was holding on to a rop to the top of the bin which was used to climb in an

Riedman was standing on a catwalk along side the bin at the
the accident occurred, supervising the work being done there
Trombi and Palmer (Tr. at 57).

I find that the above facts show a violation of mandato
safety standard 30 C.F.R. § 57.15-5 which provides as follow

> Mandatory. Safety belts and lines shall be worn whe
> men work where there is danger of falling; a second
> person shall tend the lifeline when bins, tanks, or
> other dangerous areas are entered.

There can be no dispute that the hopper bin in this case
should be considered a dangerous area. The actual occurrence
Trombi's fall and the resulting injuries best depict what the
standard is designed to prevent.

The only defense presented by respondent Riedman for all
these miners to enter the bin without safety belts or lines i
that he thought it was safer. Riedman testified that the roc
located on the side of the hopper where the catwalk is locate
the only place where the safety belt could be tied or tended.
the miners were wearing safety belts, when the rock fell, the
iners would have been pulled into it and buried alive (Tr. a
6).

I reject this argument as being unrealistic. First, Pal
as able to escape by holding onto the rope that was tied to
op and used for climbing in and out of the bin. If the loca
f the catwalk was a problem, then other means to handle the
ere required. No explanation can justify the action of
anagement in this case.

The Commission in Secretary of Labor v. Kenny Richardson
MSHRC (1981), Richardson v. Secretary of Labor, 609 F. 2d 63
1982), review denied, held section 110(c) of the Act to be
onstitutional and enunciated the critical elements which
onstitute a violation of this section. The corporate operat
ust first be found to have violated the Act. Further, if a
erson, such as supervisor, is in a position to protect an
mployee's safety and health and fails to act on the basis of
nformation or knowledge or the reason to know of the existen
violative act, he has acted knowingly and in a manner contr
o the remedial nature of the statute.

mission by the corporate operator that the conditions alleg
e citations existed and were violations of the respective he
d safety standards listed therein as a matter of law. Range
el Corporation, Docket Nos. WEVA 80-56-R, 80-57-R and 80-58
ebruary 10, 1981)(AJJ). Eastern Associated Coal Corp. v.
cretary, Docket No. WEVA 80-120-R, (May 20, 1980); The Valle
mp Coal Company, 1 IBMA 196, 204 (1972).

As to the second element described above, respondent
edman's liability under section 110(c) of the Act for the ac
Trombi and Palmer turns on whether he knowingly authorized,
dered, or carried out such violation. There can be no quest
at he did all three of the above for as the direct and immed
pervisor of these two employees, he was present on the catwa
ong side the bin when Trombi and Palmer entered it without
fety belts or lines. There can be no valid argument in defe
Riedman's actions in this case. It must be obvious from th
ecarious position of the two miners in the bin that an accid
s possible endangering their health and safety.

NALTY

The Secretary originally proposed a penalty of $500.00 in
is case. At the hearing, he proposed that the penalty be ra
$700.00. I find that the facts in this case show beyond a
ubt that Riedman was negligent in allowing Trombi and Palmer
ter the bin without safety belts or lines. The only evidenc
esented to explain the basis for such actions was Riedman's
inion that such equipment posed a greater danger than not us
em. The argument is not accepted as reasonable. If the act
sed this kind of danger, other means were required to accomp
e task.

The gravity of the action on the part of Riedman is seric
the resultant injuries to Trombi were severe and the
ssibility of death was present.

Riedman was asked at the hearing by his counsel if the
yment of a $700.00 penalty would cause a financial hardship?
edman replied: "It won't help any". Riedman earned $34,000.
nually at the time of his testimony in this case (Tr. at 58,
).

I find that the original penalty of $500.00 is appropriat

79, violated 30 C.F.R. § 57.15-5 as alleged in withdrawal No. 375785 in failing to require safety belts and lines d by a second person for miners entering bins, tanks, or dangerous areas.

3. Respondent Robert A. Riedman violated section 110(c) of ct in knowingly authorizing, ordering and carrying out the tion alleged in withdrawal order No. 375785.

ORDER

The respondent Robert A. Riedman is found to have violated on 110(c) of the Act and is ORDERED to pay a penalty 00.00 within 40 days of the date of this decision.

Virgil E. Vail
Administrative Law Judge

bution:

lip Smith, Esq., Office of the Solicitor
epartment of Labor, 4015 Wilson Boulevard,
ton, Virginia 22203

. Reid, Esq., Reid, Babbage & Coil
ox 1300, Riverside, California 92502

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 83-31
v.	:	A.C. No. 46-01816-03504
	:	Gary No. 50 Mine
UNITED STATES STEEL MINING CO., INC., Respondent	:	

DECISION

Appearances: Howard K. Agran, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for Petition
Louise Q. Symons, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the petition for asses ment of civil penalty filed by the Secretary of Labor p suant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," for two violations of regulatory standards. At hearing Petitioner requested to modify the pleadings by withdra ing Citation No. 2029554 from the case on the grounds t the citation had been vacated before the request for he ing had been filed. Under the circumstances, the Peti- tioner's request to withdraw the citation is granted. Commission Rule 11, 29 C.F.R. § 2700.11.

The remaining citation at issue, Citation No. 9914230, charges a violation of the mandatory standard 30 C.F.R § 70.100(a). Since the Respondent concedes th existence of the violation as charged, the only issues before me are whether the violation was "significant an substantial" as defined in the Act and as interpreted b the Commission in Secretary v. Cement Division, Nationa Gypsum Co., 3 FMSHRC 822 (1981), and the appropriate pe alty to be assessed. The citation alleges that "[b]ase on the results of five valid dust samples collected by

health hazard if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." The Secretary contends that there is a reasonable likelihood that exposure to high concentrations of respirable coal dust will result in pneumoconiosis, massive fibrosis, emphysema, stomach cancer, and chronic bronchitis. It is not dispute that these are illnesses of a reasonably serious nature.

Respirable dust samples taken on three consecutive days in the July/August 1981 bi-monthly sampling cycle from the longwall tailgate operator at the Gary No. 50 Mine show an average exposure of 3.6 milligrams of respirable dust per cubic meter. In addition the 197 samples taken from that same designated occupation over a period of 3-1/2 years (August 14, 1979 to March 7, 1983), show an average exposure of 3.12 milligrams of respirable dust per cubic meter. It is conceded that the cited longwall unit has been unable to consistently meet the 2 milligram per cubic meter standard set forth in the regulations and it is considered by both parties to be technologically infeasible to operate that unit consistently within compliance of the standard.[1]

According to Thomas K. Hodous, M.D., a board certified expert in internal and pulmonary medicine, evidence exists that demonstrates that continued exposure of coal miners to respirable coal dust increases the risk for at least five disease processes; namely stomach cancer, emphysema, chronic bronchitis, pneumoconiosis and massive fibrosis. While mortality studies have shown an increased incidence of stomach cancer in coal miners, Dr. Hodous

[1] In light of this evidence one must wonder why this longwall unit had not long ago been closed down by MSHA under available statutory procedures. See e.g. §§ 104(b), 104(d) and 104(e) of the Act. When asked at hearing why closure orders had not been effectuated (even after two years of noncompliance) the MSHA witness could only respond "That was what I didn't want you to ask." While MSHA urges in this case a finding that the dust violations are "significant and substantial" the only real significance of such a finding is its effect on triggering withdrawal order

result of exposure to coal dust.

According to Dr. Hodous, chronic bronchitis can als result from dust exposure including exposure to non-respirable dust i.e. dust particles larger than 5 micron in size. According to the studies cited by Dr. Hodous, coal miners may suffer chronic bronchitis in a matter of 24 months. The disease leads to coughing and phlegm pro duction and in some cases increased pulmonary infection. In severe cases, cough syncopy may develop wherein the cough is so severe that the individual may faint.

The fourth illness described by Dr. Hodous as resul ing from exposure to respirable coal dust is coal worker pneumoconiosis. More specifically, pneumoconiosis is a lung disease caused by the deposition of respirable coal dust on the lung and the body's reaction to it. Exposur to respirable dust over a period of years results in the accumulation of coal particles into what are called macu surrounding the spots of coal in the terminal airways an the air sacs of the lung. Continuous exposure to coal d may cause the condition to spread and involve most parts the lung. The condition may worsen to progressive massi fibrosis involving the destruction of alveoli and distor tion of the remaining lung tissues. While simple coal workers pneumoconiosis is usually asymptomatic, progessi massive fibrosis or complicated coal workers pneumoconio ordinarly causes shortness of breath and cough. It can also cause severe pulmonary impairment and early death. There is no known treatment which can reverse the diseas process of these impairments. However, in the case of simple pneumoconiosis, removing the afflicted person fro the offending exposure will prevent further progression. In the case of massive fibrosis, however, lung deteriora tion may continue without continued exposure to coal dus

According to Dr. Hodous, several studies from Briti pneumoconiosis field research correlate the degree of ex sure experienced by coal miners with the probability of contracting pneumoconiosis. The first is a study entitl "The Relation Between Pneumoconiosis and Dust Exposure i British Coal Mines" authored by Jacobsen, Rae, Walton an Rogan, (Exhibit G-6). The second is a follow-up study

have shown that 15 percent of the miners who have contract 2/1 pneumoconiosis can also be expected to develop progres sive massive fibrosis over the subsequent 10 years. Based on these studies, Dr. Hodous calculated that among healthy miners exposed over a working lifetime to the dust levels evidenced in this case 1.7 percent to 2.4 percent will develop Category 2/1 or greater pneumoconiosis. As previously noted, a miner with 2/1 pneumoconiosis with continuing dust exposure has a greatly increased risk of developing progressive massive fibrosis, a disease that ca result in severe pulmonary impairment and early death.

Respondent challenges the probability assessment in this case on the grounds that it is based upon unreliable data in the cited British studies. There is no evidentiary basis, however, for the challenged reliability. It is no more than a bald unsupported allegation. Moreover the expert testimony of Dr. Hodous affirmatively corroborates the reliability of the studies. Respondent also argues that Dr. Hodous' conclusions are based on invalid assumptions regarding future work experience of miners in the Gary No. 50 Mine. While the specific longwall mining unit cited in this case may not be in continuous operation and may not continuously expose the same miners to the same excessive levels of respirable dust evidenced in this case, I find that the evidence is sufficient from which probability estimates may reasonably be inferred for the limited purpose of determining whether or not the cited over-exposu is "significant and substantial."

Finally, Respondent argues that Dr. Hodous' projections do not take into consideration that 50 percent of the miners at the cited mine were wearing personal protective equipment. Even assuming, however, that this representation was correct and that the alleged protective equipment brought actual exposure levels to the prescribed limits, it is apparent that the remaining 50 percent of the miners

2 The International Labor Organization classifies x-ray evidence of simple pneumoconiosis based on the profusion of dots appearing on the lung films. There are four major categories from 0 to 3 each further subdivided into three categories 0 to 2. Category 0 would be a normal film and Category 3 would show a high profusion of dots indicating a severe disease process.

with the studies demonstrating a correlation between lon
term exposure to respirable dust and pneumoconiosis, I
find that there does indeed exist a reasonable likelihoo
that the cited exposures in this case significantly and
substantially contribute to the reasonably serious illne
coal worker's pneumoconiosis. The uncontested testimony
of Dr. Hodous that continuing coal dust exposure increas
the risk of chronic bronchitis and, for susceptible indi
viduals, of emphysema and stomach cancer also supports t
inference that it is reasonably likely that the cited ex
sure significantly and substantially contributes to thes
reasonably serious illnesses. The violation herein is
accordingly "significant and substantial." within the me
ing of the National Gypsum decision. See also Secretary
v. Consolidation Coal Co., 5 FMSHRC 378 (1983), (Judge
Broderick) pet. for review granted April, 1983; and
Secretary v. U.S. Steel Mining Co., 5 FMSHRC 46 (1983)
(Judge Kennedy).

In determining the amount of penalty to be assessed
in this case, I consider that the violation was serious
demonstrated by the above discussion. Based on the long
history of excessive dust levels in this section of the
Gary No. 50 Mine, and the inability of the Respondent to
operate the cited longwall unit in continuous compliance
with the respirable dust standard, I must find that the
Respondent fully expected to operate in violation of tha
standard. At the same time, I recognize that the Respon
dent has been working with MSHA technical support staff
and has been making extraordinary efforts at some expens
to bring this and other longwall units into compliance
with the regulation. The Respondent has also, in recogn
tion of its inability to bring the longwall unit into co
pliance, furnished personal protective equipment for the
mining crew. Under all the circumstances, I find that a
penalty of $250 is appropriate.

ordered to pay a civil penalty of $250 within 30 days of the date of this decision.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution:

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Louise Q. Symons, Esq., 600 Grant Street, Pittsburgh, PA 15230 (Certified Mail)

/fb

Petitioner	:	A.C. No. 05-03431-050
v.	:	
	:	Alcott Pit
	:	
	:	Docket No. WEST 81-29
SOUTHWAY CONSTRUCTION COMPANY, INC.,	:	A.C. No. 05-03586-050
	:	
Respondent	:	Sargents Pit

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicit
U. S. Department of Labor, Denver, Colorado,
for Petitioner;
J. O. Lewis, Esq., Alamosa, Colorado,
for Respondent.

Before: Judge Carlson

These two cases, consolidated for hearing, arose out of inspection of respondent's gravel pits and crushing operation The cases were heard at Pueblo, Colorado, under provisions of Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 e the "Act"). The Secretary seeks civil penalties for seven a violations of safety standards promulgated under the Act.

The parties waived the filing of post-hearing briefs.

ISSUES

The questions to be decided are:

(1) Whether respondent's operation constituted "mining" within the contemplation of the Act.

(2) Whether respondent's operation affected commerce within the contemplation of the Act.

(3) If respondent was covered by the Act, whether it committed the violations alleged, and if so what civil penalties are appropriate.

pectors.[2] Counsel for Southway Construction Company, [illegible]
uthway) called no witnesses, and was content to cross [illegible]
inspectors. The undisputed evidence showed that [illegible],
the times of inspections, was extracting river rock and [illegible]
n natural deposits forming a bench along a stream bed. [illegible]
, in formation, was sufficiently loose to be removed [illegible]
the buckets or scoops of front-end loaders. The product [illegible]
eened on the site to separate small, gravel-size rock, [illegible]
led no further processing, from larger stones which [illegible]
shing to make aggregate.

Section 3(h)(1) defines a "coal or other mine" as "[illegible]
and from which minerals are extracted in non-liquid [illegible]
s definition must be given a broad reading. Cyprus [illegible]
erals Corporation, 3 FMSHRC 1 (1981). Sand and gravel [illegible]
rations clearly fall within the definition. Marshall v. [illegible]
crete Products, Inc., (U.S. District Court for the [illegible]
lew Mexico), 1 MSHC 2237 (1980); B & N Construction, Inc., [illegible]
MSHRC 427 (1981) (ALJ).

I therefore hold that the Southway operation was a "[illegible]
ain in the meaning of the Act.

THE COMMERCE ISSUE

Southway denied that it was engaged in an enterpri[illegible]
nerce, and put the government to its proofs upon that [illegible]
government undertook to supply those proofs by show[illegible]
thway provided crushed rock or aggregate to the Col[illegible]
nway Commission for use in highway construction; tha[illegible]
d equipment manufactured outside the State of Colora[illegible]
thway used the telephone, an instrument of interstat[illegible]
the conduct of its business.

The Act covers all mines "the products of which enter[illegible]
ce or the operations or products of which affect com[illegible]
U.S.C. § 803. This language gives the widest juris[illegible]
ainable under the commerce clause of the Constitut[illegible].
nnan v. OSHRC, 492 F.2d 1027 (2d Cir. 1974).

[illegible] of the evidentiary hearing was of [illegible]

The evidence shows that Southway closed down its Alcott operation shortly after Garcia's inspection and moved to a l known as the Sargents pit. Inspector Porfy Tafoya inspected location with another MSHA inspector on September 4, 1979. site was also adjacent to a waterway. Tafoya testified that foreman acknowledged that Southway was crushing aggregate fo Colorado Highway Department. He further testified that the Department had representatives at the site and that he obser aggregate being hauled away in Highway Department trucks. N this evidence was challenged.

It has long been clear that even businesses which sell product within a single state fall within the broadest appli of the commerce power. This is so because of the cumulative of small producers upon interstate transactions. Wickard v. 317 U.S. 111 (1942); Fry v. United States, 421 U.S. 542 (197 Respondent's affect on commerce is doubly clear in this case because its aggregate product was used in the construction o roads and highways which play an inevitable part in intersta transportation, B.L. Anderson, Inc., 3 FMSHRC 1019 (1981) (A aff'd. sub nom B.L. Anderson, Inc. v. FMSHRC, 668 F.2d 442 John Petersen, d/b/a Tide Creek Rock Products, 4 FMSHRC 2241 (1982) (ALJ).

Moreover, Inspector Tafoya testified that he ascertaine that several of the pieces of heavy mobile equipment used in pit were manufactured outside of Colorado. His knowledge wa upon up-to-date listings maintained by MSHA in connection wi licensing and approval of mining equipment. Familiarity wit such information, he indicated, was essential to the perform of his duties. Under such circumstances the information is inherently credible, and not subject to exclusion under the hearsay rule as respondent contends. Use of equipment which has moved in interstate commerce affects commerce within the meaning of the Act. Avalotis Painting Company, 9 OSHA 1226 United States v. Dye Construction Company, 510 F.2d 78 (10th 1975).

The Secretary also attempted to show that Southway used telephone in the conduct of its business, a further indicati of commerce. That issue is not further examined here since evidence plainly shows that the Southway enterprise "affecte commerce."

ocket No. WEST 80-111-M (The Alcott Pit)

tation 327198

At the Alcott Pit, Inspector Garcia saw several oxygen cy
the floor of the pit. The cylinders, he testified, were up
d unsecured by straps or wires. Gauges showed the cylinders
ll. He cited this condition as a violation of the safety st
ted at 30 C.F.R. § 56.16-5 which provides:

> Compressed and liquid gas cylinders shall be secured in a safe manner.

e inspector indicated that the nearest employee, approximate
feet away, was operating a crusher. Immediately upon citat
uthway moved the cylinders up against a trailer, and secured
e danger presented by unsecured cylinders, the inspector sta
s that if they were accidently tipped or turned over, the ga
uld break, creating a possibility of ignition, or the cylind
emselves could "shoot out," propelled by the liberated gasse

These facts, all undisputed, clearly establish a violatio
e cited standard.

The inspector, in his citation, classified the violation
ignificant and substantial." That statutory term was define
ment Division, National Gypsum Co., 3 FMSHRC 822 (1981), whe
e Commission held that it applied to those violations in whi
ere exists "a reasonable likelihood that the hazard contribut
will result in an injury or illness of a reasonably serious
ture." Respecting this citation, the inspector testified tha
did not now consider that the violation qualified as signifi
d substantial under the National Gypsum test. Counsel for th
cretary joined in that view and moved to amend the charge to
iminate the significant and substantial designation.

Although this judge has in the past had occasion to scruti
ch motions closely, the Secretary's reappraisals will be acce
this case since the original penalty assessment amounts were
all - an indication that the violations were relatively minor

hazard of the unsecured oxygen bottles was minimal. Under all the circumstances only a light penalty is justified. The originally proposed penalty of $24.00 is light, however, and deem that amount appropriate. A penalty of $24.00 is therefo assessed.

Docket No. WEST 81-295-M (The Sargents Pit)

Citation No. 326265

Inspector Tafoya testified that he observed that insulat on a splice on a 480 volt electrical cable furnishing power t a conveyor motor was inadequate, exposing the interior wires the cable. The area of which he complained was very near the point at which the cable entered the motor case. Also, the bushing designed to protect the cable from wear and the effec of vibration where it entered the motor casing was not in the proper place. It therefore offered no protection to the cab. These conditions caused the inspector to charge a violation o 30 C.F.R. § 56.12-8, which, as pertinent here, provides:

> Power wires and cables shall be insulated adequately where they pass into and out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings.

The inspector maintained that the cable presented a haza of electrical shock or electrocution to any of the four emplo who might for any reason touch the cable or the motor housing hold that this uncontradicted testimony establishes the viola alleged. The cable was neither adequately insulated, nor was fitting at the engine cover "proper".

ould lead to electrocution or severe shock. Four employees w
otentially exposed to this hazard, and he singled out a worke
oing clean-up in the immediate area of the belt. I agree wit
he inspector's assessment, and conclude that the violation ca
ith it the reasonable likelihood of injury of a reasonably se
ature. It was therefore properly classified as significant a
bstantial.

The Secretary seeks a penalty of but $40.00. Giving due
nsideration to the penalty criteria discussed earlier, toget
th the gravity of the violation, a $40.00 penalty is surely
cessive. The proposed amount will therefore be assessed.

tations 326266 and 573521

These two citations represent virtually identical conditi
two separate conveyor systems at the pit. On each conveyor
spector Tafoya observed take-up pulleys with exposed or ungu
nch points. The exposed pinch points on both machines were
tuated about four or five feet above ground level. Neither
nger point was protected by any natural obstruction which wo
nd to isolate employees from contact. The inspector acknowle
at no employees were working in proximity to the pulleys at
me of his visit, but observed that clean-up of conveyor spil
uld necessarily be done in the immediate area from time-to-ti
wary workers, he indicated, could have clothing caught up in
nch point, with resulting personal injury. He cited these
nditions as violations of 30 C.F.R. § 56.14-1, which provides

> Gears; sprockets; chains; drive head, tail and take-up pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

e facts establish violations. Here again the violations were
iginally charged as significant and substantial, but the
cretary moved at trial to delete that designation owing to th
spector's belief that the circumstances did not meet the Nati
osum test. The inspector's view was apparently based on the
rly remote possibility that workers would be near the danger
ea presented by the pulleys. While the validity of that view
arguable, I am not disposed to quibble with it in a case of

While at the site, Inspector Tafoya determined that two pieces of heavy mobile equipment were operating without audib reverse signal alarms. Both machines, a front-end loader and Caterpillar bulldozer, were equipped with such automatic devi On both machines, however, the alarms were out-of-order. The inspector also testified that operators of the machines had obstructed views to the rear, and that while he watched backi maneuvers, neither operator was provided with an observer to signal when the way was clear. Tafoya cited these conditions as violations of 30 C.F.R. § 56.9-87, which provides:

> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The inspector indicated that there was no employee foot traff in the area of the cited equipment while he watched. There w however, no impediments to the presence of workers, and there thus a "potential" for endangerment. The evidence shows that alleged violations occurred.

The Secretary seeks a penalty of $36.00 for each reverse alarm violation. Even if not significant and substantial, I sider these violations of greater gravity than those for whic lesser penalties have been assessed herein. Large pieces of equipment need functioning back-up alarms whenever there is a possibility of foot traffic on the pit floor. The $36.00 pen amounts will be affirmed.

s generator trailer which controlled electrical current
ety of equipment in the pit, including the conveyors and
None of these boxes, he testified, was labeled to show
ece of equipment it controlled. This condition caused him
the respondent for violation of 30 C.F.R. § 56.12-18, which

> Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

inspector acknowledged that the foreman of the operation
ther three employees probably knew the purpose of each box.
heless pointed out that in the event of an emergency persons
n employees might need to deenergize a particular circuit
delay or any need for study or experimentation.

requirement of the standard is unconditional; the violation
d.

Secretary does not retreat from his original position that
tion was significant and substantial. Curiously, however,
sed penalty at $22.00 was smaller than that for any other
in this proceeding. While the condition of the control
clearly violative of the standard, I find the likelihood of
nt, and hence any injury, quite remote under the facts of
I must therefore hold that the Secretary failed to establish
ficant and substantial element of the charge.

$22.00 penalty proposed is appropriate and will be assessed.

CONCLUSIONS OF LAW

istent with the facts found true in the narrative portions of
sion, the following conclusions of law are made:

Southway was engaged in "mining" under the Act and its mining operations and production affected commerce. It was thus subject to the Secretary's enforcement jurisdiction.

Southway violated the safety standard published at 30 C.F.R. § 56-16.5 as alleged in citation 327198 in Docket No. WEST 80-111-M. The violation was not

573521 in Docket No. WEST 81-295-M. The violations were not "significant and substantial" within the meaning of the Act. A civil penalty of $24.00 is appropriate for each violation.

(5) Southway violated the safety standard published at 30 C.F.R. § 56.9-87 as alleged in citations 573520 and 573522 in Docket No. WEST 81-295-M. The violations were not "significant and substantial" within the meaning of the Act. A civil penalty of $36.00 is appropriate for each violation.

(6) Southway violated the safety standard published at 30 C.F.R. § 56.12-18 as alleged in citation 573523 in Docket No. WEST 81-295-M. The violation was not "significant and substantial" within the meaning of the Act. A civil penalty of $22.00 is appropriate for the violation.

ORDER

Accordingly, all citations, as modified herein, are ORDERED
rmed, and the respondent Southway shall pay to the Secretary
abor civil penalties totalling $206.00 within 30 days of the
of this order.

John A. Carlson
Administrative Law Judge

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